Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

SHELDON FUTERNICK, d/b/a HOLIDAY WEST MOBILE HOME PARK and d/b/a HOLIDAY WOODS MOBILE HOME PARK,

Petitioner,

v.

JON CATERINO; ROLAND HARMES, Director, Michigan Department of Natural Resources; and VERNICE DAVIS ANTHONY, Director, Michigan Department of Public Health,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the Equal Protection Clause of the 14th Amendment protect an individual from selective enforcement of state law where the state official is motivated by malice or bad faith, but there is no allegation that the selective enforcement was designed to punish the individual for the exercise of constitutional rights nor any allegation that a "suspect" classification is involved?

PARTIES BELOW

The following parties were named as defendants in the United States District Court for the Eastern District of Michigan but have no interest in the outcome of this petition and are not named as parties in the caption of this Petition: Sumpter Township; Helen Teall, Barbara Dudek, Arness Cox and Louis Banotai, Sumpter Township Trustees; Marvin Banotai, Township Supervisor; Paul Johnson, Deputy Supervisor and Township Administrator; Joan Oddy, Township Clerk; John Morgan, Township Treasurer; Michigan Department of Natural Resources; Michigan Department of Public Health; and Michigan Mobile Home Commission. Notice of noninterest has been served pursuant to Supreme Court Rule 12.6.

The other parties in the courts below are parties to this Petition and are identified in the caption.

Petitioner Sheldon Futernick, pursuant to Supreme Court Rule 29.6, certifies that there are no parent companies or nonwholly owned subsidiary companies to be listed.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals is reported as *Futernick v. Sumpter Township*, 78 F.3d 1051 (6th Cir. 1996). A copy of the opinion is included in the Appendix at 1. The court of appeals' order denying Petitioner's petition for rehearing and suggestion for rehearing en banc is included in the Appendix at 35. A copy of the district court's opinion and order is included in the Appendix at 22. The district court's concurrent order of dismissal with prejudice and its subsequent order granting reconsideration and dismissing the action without prejudice as to Defendant Sumpter Township and its officials are included in the Appendix at 31 and 33.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on March 13, 1996. On April 25, 1996, the court of appeals denied Petitioner's timely-filed petition for rehearing and suggestion for rehearing en banc. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

CONCISE STATEMENT OF THE CASE

Introduction

This case presents a constitutional question of fundamental importance: Does the Equal Protection Clause of the 14th Amendment protect an individual from selective enforcement of state law where the state official is motivated by malice or bad faith – even though there is no allegation that the official is motivated by a desire to punish the individual for the exercise of constitutional rights, nor any allegation that a "suspect" classification, such as race or religion, is involved?

In the present case, the United States Court of Appeals for the Sixth Circuit ruled that the Equal Protection Clause affords no protection for selective enforcement, absent an allegation that the claimant was targeted because of his or her membership in a "protected" group or because of his or her exercise of a constitutional right. By so narrowing the breadth of the Equal Protection Clause, the Sixth Circuit's decision undermines the fundamental fairness that the Equal Protection Clause was designed to promote. Furthermore, the Sixth Circuit's decision conflicts with decisions of the First, Second, Seventh, Eighth and Tenth Circuits and fails to cite a single decision endorsing the narrow scope it assigns to the Equal Protection Clause. For these reasons, this Court should grant certiorari.

Factual Statement

Petitioner Sheldon Futernick, the plaintiff below, is the owner of two mobile home parks in Sumpter Township, Michigan. Effluents from the parks are discharged to groundwater and surface waters, pursuant to permits issued by the Michigan Department of Natural Resources ("MDNR").[1] (R. 1: Verified Complaint at ¶ 11). In March 1991, MDNR issued a new, stringent permit for one of the parks (Holiday Woods), which would have required substantial upgrades by September 1992, costing over $700,000; similar costly upgrades would be required at Mr. Futernick's other park (Holiday West). Such upgrades would be totally unnecessary if a sewer system, not yet constructed but contemplated by the Township, were constructed and brought to Mr. Futernick's parks. Connecting the parks to the sewers would save Mr. Futernick the substantial duplicative costs of constructing the upgrades and totally dismantling the wastewater treatment facilities, because the permits and the upgrades would no longer be legally required. (R. 37: Appendix to Motion Response, Ex. 3: Caterino Dep. at 29-31; Ex. 4: Burns Dep. at 16-17, 19-21). In July 1992, Sumpter Township promised Mr. Futernick that public sanitary sewer

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[1] Pursuant to a recent administrative restructuring, the functions of MDNR and the Michigan Department of Public Health ("MDPH") relevant to this case have been combined into a single entity, the Michigan Department of Environmental Quality. For purposes of clarity and consistency with the record, all references herein are made to MDNR and MDPH rather than to the new entity.

service would be provided to his parks, and Mr. Futernick agreed that the parks would pay "tap-in" fees connecting the parks to the sewer in advance of construction. Copies of the Township's written commitment to provide sewer were furnished to officials of MDNR and MDPH. (R. 37: Appendix to Motion Response, Exs. 5, 6).

Initially, in August 1992, the state enforcement official, Respondent Jon Caterino of MDPH, appeared to agree that Holiday Woods would not have to upgrade the facilities to meet the stringent new permit requirements pending connection to the Sumpter Township sewer that was yet to be constructed. (R. 37: Appendix to Motion Response, Ex. 3: Caterino Dep. at 41-43). MDNR also agreed that Holiday West's compliance with proposed new permit requirements would similarly be stayed pending connection to the sewer. (R. 37: Appendix to Motion Response, Ex. 3: Burns Dep. at 9-23).

However, on October 27, 1992 – after the deadline for completing the upgrades at Holiday Woods had already passed – Caterino falsely claimed to have no firm knowledge that the Township would provide sewer to Mr. Futernick's parks. At a meeting including Caterino and Township officials held in November 1992, Mr. Futernick's agent reminded Caterino of his prior agreement to hold compliance in abeyance. Caterino testified at deposition that Mr. Futernick's son and agent was excluded from a portion of the meeting, during which Caterino and the other participants discussed their dislike for him. (R. 37: Appendix to Motion Response, Ex. 3: Caterino Dep. at 61-62). Following another meeting between Caterino and Township officials in December 1992, Caterino and a representative of the MDNR threatened, with the Township's

knowledge, that if Mr. Futernick did not sign a contract with Sumpter Township by December 31, 1992 regarding sewer service, enforcement action would be initiated against both parks. (R. 37: Appendix to Motion Response, Ex. 1: Letter – Burns to I. Futernick). Mr. Futernick was prepared to sign a contract with the Township, based on the July 1992 agreements, but the Township never presented a contract, and no contract was signed.

Caterino then issued a certificate of noncompliance against Holiday Woods and recommended that an operating license for that park not be issued, thereby initiating enforcement proceedings against it; punitive action was also threatened against Holiday West. (R. 37: Appendix to Motion Response, Ex. 3: Caterino Dep. at 100-02; Ex. 25: Letter – Caterino to I. Futernick; Ex. 26: Letter – Caterino to S. Futernick). Under Michigan's enforcement scheme, issuance of a certification of noncompliance is the first step in putting a mobile home park operator out of business or in jail.

No similar or comparable deadlines, requirements, demands or threats were made by Caterino, MDNR or MDPH to any other area mobile home parks. Specifically, although Caterino demanded that Mr. Futernick present him with a signed contract from the Township evidencing that sewer would be provided to Mr. Futernick's parks, no such requirement was made of other area parks. (R. 37: Appendix to Motion Response, Ex. 3: Caterino Dep. at 145-48; Ex. 16: Johnson Dep. at 33-34; Ex. 21: Banotai Dep. at 91-92, 179-80). In fact, Caterino desisted from any adverse regulatory enforcement against another mobile home park based solely on his understanding that "there is some movement toward providing sanitary sewer in

the area . . . . " (R. 37: Appendix to Motion Response, Ex. 34: Letter – Caterino to Blank). As to another area park, no adverse regulatory enforcement was taken based solely on that park's oral representation that it was "currently attempting to obtain the extension of municipal sewer service" from the Township. (R. 37: Appendix to Motion Response, Ex. 68: Letter – Lauer to Dukes). Yet, as to Mr. Futernick's parks, Caterino demanded a signed contract with the Township by a date certain, even though Caterino had been furnished with the July 1992 letter agreements from the Township evidencing that sewer service would be provided.

Caterino's disparate treatment of Mr. Futernick was further evidenced by the fact that Caterino issued a certificate of noncompliance to Holiday Woods for the alleged failure to comply with a state wastewater discharge permit, yet Caterino failed to issue certificates of noncompliance to other area mobile home parks that were illegally discharging *without any permits whatsoever*. For example, one park has been illegally discharging for *over 20 years* – yet Caterino has taken no action against it. (R. 37: Appendix to Motion Response, Ex. 3: Caterino Dep. at 161-62, 181-82). Similarly, Caterino demanded that Mr. Futernick undertake costly hydrogeological studies (although such studies had been previously performed by Mr. Futernick), while he *completely excused* other parks from performing any hydrogeological studies. (R. 37: Appendix to Motion Response, Ex. 41: Letter – Caterino to Buchanan; Ex. 62: Letter – Caterino to Zollner).

Caterino's disparate treatment of Mr. Futernick's parks could not be explained by some theory that the other parks posed a less severe public health risk than

Mr. Futernick's parks. To the contrary: the public health risks posed by the other parks were fully documented. For example, one park discharged wastewater without a permit to unsealed lagoons in close proximity to drinking water wells. (R. 37: Appendix to Motion Response, Ex. 48: Letter – Grant to MDNR). Another park had a long history of discharging raw sewage onto the open ground. (R. 37: Appendix to Motion Response, Ex. 107: Letter – Caterino to Rakocy). By comparison, Mr. Futernick's alleged failure to meet the stricter permit requirements did not pose any such health risk.

This evidence of disparate treatment, coupled with the evidence of Caterino's personal animosity toward Mr. Futernick, raises the unmistakable inference – or, at a minimum, a triable issue of fact – that Caterino initiated enforcement action against Mr. Futernick maliciously and in bad faith.[2]

Procedural Background

As a consequence of the foregoing, Mr. Futernick filed suit in the United States District Court for the Eastern District of Michigan against Sumpter Township, the directors of MDNR and MDPH, Caterino and others, alleging, *inter alia*, violations of equal protection and seeking damages and an injunction under 42 U.S.C. § 1983. Federal jurisdiction was invoked under 28 U.S.C.

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[2] In compliance with Supreme Court Rule 14.1(g), which requires a concise statement of the case, Petitioner has summarized in briefest form the evidence of selective enforcement. A more detailed presentation of this evidence – encompassing some 26 pages – can be found in Petitioner's brief on appeal filed in the Court of Appeals on February 14, 1995, at 6-32.

§ 1331 because of the presence of a federal question. The claims against the Township were settled, pursuant to an agreement obligating the Township to connect Mr. Futernick's parks to its sewer.[3] The claims against Caterino were dismissed by the district court under Fed. R. Civ. P. 12(b)(6) for failure to state a claim and on qualified immunity grounds. The claims against the directors of MDNR and MDPH – which sought injunctive relief to prevent selective enforcement – were dismissed on Eleventh Amendment grounds.

On March 13, 1996, the Sixth Circuit affirmed the dismissal of all claims. It held that Mr. Futernick had failed to state a claim because he did not allege that Caterino's selective enforcement of environmental regulations against Mr. Futernick's parks was based on Mr. Futernick belonging to a "protected group" or motivated by a desire to punish him for the exercise of a constitutionally protected right. 78 F.3d at 1056-1060. It further held that Mr. Futernick's allegation that Caterino had been motivated by a malicious, bad faith personal animus did not suffice to state a claim for denial of the equal protection of the laws. *Id.* Mr. Futernick timely filed a

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[3] While the Township did connect one of Mr. Futernick's parks (Holiday West) to the sewer, it breached the settlement agreement by failing to connect another (Holiday Woods). Mr. Futernick has been forced to sue the Township for breach of the settlement agreement, which action is pending. The state administrative proceeding effected by Caterino's certificate of noncompliance as to Holiday Woods is pending as well.

petition for rehearing on March 26, 1996, which was denied on April 25, 1996.[4]

THE REASONS FOR GRANTING THE WRIT

THE SIXTH CIRCUIT HAS RENDERED A DECISION THAT CONFLICTS WITH THE DECISIONS OF COURTS OF APPEALS OF FIVE OTHER CIRCUITS ON AN ISSUE OF FUNDAMENTAL CONSTITUTIONAL IMPORTANCE, *i.e.*, WHETHER SELECTIVE ENFORCEMENT OF THE LAW VIOLATES THE EQUAL PROTECTION CLAUSE WHERE THE DISCRIMINATION IS THE PRODUCT OF MALICE OR BAD FAITH, BUT THERE IS NO ALLEGATION THAT IT WAS DESIGNED TO PUNISH AN INDIVIDUAL FOR THE EXERCISE OF CONSTITUTIONAL RIGHTS NOR THAT IT WAS BASED ON A "SUSPECT" CLASSIFICATION.

In this case, the Sixth Circuit held that an equal protection claim for selective enforcement of the law could be stated only where the selective enforcement was based on a suspect classification or was designed to punish an individual for exercising fundamental rights. According to the Sixth Circuit, however, malice or bad faith on the part of the enforcing official directed against the claimant is not sufficient by itself to trigger the Equal

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[4] The Sixth Circuit held that the district court's holding on the Eleventh Amendment issue was erroneous, but affirmed the dismissal of the claims against the directors of MDNR and MDPH nonetheless on the same grounds stated for its dismissal of the claims against Caterino. 78 F.3d at 1005. The Sixth Circuit did not address the qualified immunity issue.

Protection Clause. By so ruling, the Sixth Circuit placed itself in a minority of one, in conflict with the decisions of five other circuits.

The Seventh Circuit recently addressed this issue in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995) (Posner, C.J.). In *Esmail*, plaintiff alleged that he had been denied renewal of his liquor license, while the licenses of others were routinely renewed, solely because city officials had developed a "deep-seated animosity" toward him. *Id.* at 177-178. The court held that plaintiff had stated an equal protection claim – despite the absence of any contention that the deprivation was based on suspect classification or impinged on a fundamental right:

> If the power of government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court.

Id. at 179.

The Second Circuit decision in *FSK Drug Corp. v. Perales*, 960 F.2d 6 (2d Cir. 1992), is in accord with *Esmail*. FSK involved a registered pharmacy, which alleged that the New York State Department of Social Services had improperly denied its application for re-enrollment as a result of its selective enforcement of regulations against only large pharmacy and physician providers. The court recognized that there had been no allegation of discriminatory treatment based on a suspect classification or exercise of constitutional rights, but the court nonetheless "review[ed] the record for evidence of a malicious or bad faith intent to injure." *Id.* at 10. *Accord, LeClair v. Saunders*,

627 F.2d 606, 609-610 (2d Cir. 1980) (selective enforcement of regulations is violation of equal protection where "selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person").

The First Circuit has also agreed with the principle enunciated in *Esmail. Yerardi's Moody St. Restaurant v. Board of Selectmen*, 932 F.2d 89 (1st Cir. 1991). There, plaintiff brought a § 1983 claim, alleging that it had been improperly denied an extension of the closing time of its restaurant under its liquor license, unlike others similarly situated who were routinely granted an extension. There was no allegation of racial or religious discrimination, nor a claim that the plaintiff was being punished for the exercise of fundamental rights. Nonetheless, the court held that the plaintiff could overcome a motion for summary judgment if there were "evidence from which a jury reasonably could find that the Board acted with malicious or bad faith intent to injure Yerardi's." *Id.* at 92. *Accord, Rubinovitz v. Rogato*, 60 F.3d 906, 911 (1st Cir. 1995) (allegations of selective enforcement of building code provisions stated equal protection claim, because "in the absence of invidious discrimination or the abuse of a fundamental right, a party may establish an equal protection violation with evidence of bad faith or malicious intent to injure").

The Tenth Circuit followed *Esmail*'s teaching in *Smith v. Eastern New Mexico Medical Center*, 72 F.3d 138, 1995 WL

749712 (10th Cir. December 19, 1995),[5] where a physician and nurse alleged violation of the Equal Protection Clause because of their employment termination, which they alleged was malicious, motivated by personal animosity and inconsistent with the disciplinary treatment accorded others similarly situated. In reversing the district court's granting of a motion to dismiss, the court of appeals emphasized:

> [T]he Equal Protection Clause protects not only against discrimination where victims within an identified classification or group are injured, but also where the plaintiff alleges "an element of intentional or purposeful discrimination" so as to invoke the clause to protect an individual victim.

1995 WL 749712 at 7. In reaching its decision, the Tenth Circuit relied on *Burt v. City of New York*, 156 F.2d 791 (2d Cir. 1946), a decision authored by Judge Learned Hand, where the court held that an architect's claim that he had been "singled . . . out for unlawful oppression" was sufficient to state an equal protection claim, although he was not a member of a "protected" group, nor did he claim to be the victim of retaliation for the exercise of his constitutional rights. 156 F.2d at 791-793.

In *Batra v. Board of Regents of University of Nebraska*, 79 F.3d 717 (8th Cir. 1996), where tenure-track assistant professors alleged that they had been disparately treated in the tenure review process, the Eighth Circuit concurred in the view that allegations of suspect classification or

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[5] A copy of the *Smith* decision, which is unpublished, has been lodged with the Clerk's office.

impingement of fundamental rights are not necessary to state an equal protection claim:

> Plaintiff need not prove that another fundamental right was trampled – the right to equal protection of the law is itself fundamental. Nor need plaintiff prove that he or she was victimized by a "suspect classification" such as race.

Id. at 721.

In fact, the Sixth Circuit *itself*, in a prior decision, had concurred in the view that a plaintiff alleging selective enforcement of the law *did* state an equal protection claim, notwithstanding the absence of suspect classification or impingement of fundamental rights, so long as plaintiff alleged that the state official acted out of malice or in bad faith. In *Wright v. MetroHealth Medical Center*, 58 F.3d 1130 (6th Cir. 1995), the court considered whether terminated public employees, who alleged selective enforcement of their employer's anti-nepotism policy, had stated an equal protection claim. The test set out by the court clearly included malice or bad faith as impermissible motives:

> "A claim of selective application of a facially lawful state regulation requires a showing that . . . the selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations, such as race or religion, to punish or inhibit the exercise of constitutional rights, or by a malicious or bad faith intent to injure the person." *FSK Drug Corp. v. Perales*, 960 F.2d 6, 10 (2d Cir. 1992). *Because plaintiffs do not allege invidious discrimination because of an impermissible consideration or*

> *that MetroHealth acted in bad faith,* we conclude that the district court did not err in granting summary judgment to MetroHealth on this basis.

Id. at 1137 n.7 (emphasis added).

Despite this overwhelming authority, the Sixth Circuit in the present case held that allegations of malice or bad faith are *not* sufficient to state an equal protection claim. Feeling unconstrained by its prior decision in *Wright*, on the theory that it was dictum, 78 F.3d at 1057, n.10, the Sixth Circuit reasoned that the Equal Protection Clause only protects against arbitrary "classifications," and that proceeding against a particular individual out of malice would not be deemed a "classification." 78 F.3d at 1058.

In *Esmail*, Chief Judge Posner refuted this argument by noting that the smaller a class is – and there is none smaller than a class of one – the greater the need for judicial protection, the principal purpose of the Equal Protection Clause:

> [C]lassifications should be scrutinized more carefully the smaller and more vulnerable the class is. A class of one is likely to be the most vulnerable of all, and we do not understand therefore why it should be denied the protection of the equal protection clause.
>
> Esmail's suit thus is not barred by the "class of one" rule, because there is no such rule.

53 F.3d at 180.

The Sixth Circuit's reliance on the notion of "classification" is further undercut by the fact that the court

itself recognized that the Equal Protection Clause protects a person who is victimized for the exercise of his constitutional rights. Such a person is a class of one – in precisely the same manner as is a claimant who is the victim of the personal animus of a governmental official. Thus, a claim based on malice or bad faith cannot be written out of the Equal Protection Clause based on the absence of a "classification."

The Sixth Circuit also purported to find a policy reason why the Equal Protection Clause should not be read broadly: the number of potentially meritless claims. 78 F.3d at 1058. But it cannot be sound constitutional jurisprudence to negate the existence of a right on the number of questionable lawsuits it might generate. Numerous constitutional provisions spawn meritless lawsuits. Nevertheless, the courts remain open for those with valid claims, even if the societal price is the filing of meritless ones.[6]

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[6] Although neither the district court's judgment of dismissal nor the court of appeals' judgment affirming the dismissal rested on a finding that Mr. Futernick's claims lacked merit as a matter of law, it is clear that the court of appeals believed that Caterino could "easily rebut" Mr. Futernick's claims. 78 F.3d at 1058, n.12. In fact, the court was mistaken. The court believed that Caterino could explain his failure to enforce against parks that were discharging without permits, because, according to the court, Caterino's jurisdiction is limited to enforcing the conditions of permits already issued by MDNR. *Id.* The court offered no citation of authority in support of this proposition. In fact, Caterino does have jurisdiction to enforce against parks that discharge without permits, because MDPH is authorized to conduct annual inspections and issue annual certificates of compliance based on standards issued by the department. Mich. Comp. Laws § 125.2317. *See also* Mich.

The Sixth Circuit also reasoned that selective enforcement directed against an *individual*, as opposed to a "protected group," was not proscribed by the Equal Protection Clause, because selective enforcement based on personal animosity is, for constitutional purposes, the same as random enforcement. 78 F.3d at 1059.

In *Esmail*, Chief Judge Posner refuted this analysis, demonstrating that: (a) the Equal Protection Clause protects persons – not just groups – against arbitrary action; and that (b) while truly random enforcement is constitutionally non-objectionable, selective enforcement is not random when it is the product of a constitutionally repugnant motive:

Admin. Code R. 325.3334 (MDPH regulation requiring compliance with state law regarding wastewater discharge and generally requiring mobile home parks with on-site sewage treatment facilities to obtain MDNR wastewater discharge permits); Mich. Comp. Laws § 324.3112(1) (state law prohibiting wastewater disposal without a state permit). Thus, Caterino clearly had the legal authority to enforce against parks that were discharging wastewater without permits. The Sixth Circuit also believed that Caterino could explain why he insisted on a written contract for the sewer between Mr. Futernick and the Township, but had no such requirement for other parks, on the grounds that only Mr. Futernick "refused to pay hook-up fees." 78 F.3d at 1058. However, Mr. Futernick did not refuse to pay "hook-up" fees; in fact, he agreed to pay such fees in advance of construction as part of the July 1992 commitment by the Township. (R. 37: Appendix to Motion Response: Ex. 111: Letter – I. Futernick to Johnson). In any case, whether the claim lacks *factual* merit is irrelevant to the entirely separate question of whether the Equal Protection Clause protects individuals from bad faith, selective enforcement of state law.

> It is true that the abuse charged in this case is remote from the primary concern of the framers of the equal protection clause. *Strauder v. West Virginia*, 100 U.S. 303, 306-07, 25 L.Ed. 664 (1879); *Palmer v. Thompson*, 403 U.S. 217, 220, 91 S.Ct. 1940, 1942, 29 L.Ed.2d 438 (1971). But neither in terms nor in interpretation is the clause limited to protecting members of identifiable groups. It has long been understood to provide a kind of last-ditch protection against governmental action wholly impossible to relate to legitimate governmental objectives. *Pontarelli Limousine, Inc. v. City of Chicago*, 929 F.2d 339, 342 (7th Cir. 1991). In *Falls v. Town of Dyer*, 875 F.2d 146, 147 (7th Cir. 1989), we gave as an example "an ordinance saying: 'No one whose last name begins with "F" may use a portable sign in front of a 24-hour food shop, but everyone else may.' " Implicit in the example is the assumption that there is no nondisreputable reason for singling out persons whose last name begins with "F" for unfavorable treatment, since the mere fact of singling out does not present an issue of denial of equal protection.

53 F.3d at 180. Thus, truly random selective enforcement is not constitutionally objectionable, but selective enforcement that is the product of personal animus (or selective enforcement that cannot be explained by a nondisreputable reason) does violate the Equal Protection Clause.

Finally, the Sixth Circuit in the present case noted that federal court intervention is not necessary because state courts can be expected to protect citizens from governmental abuse. 78 F.3d at 1059. This reasoning overlooks the all-too-often accommodating attitude local

courts have towards local officials. As Chief Judge Posner explained in *Esmail*:

> Although the courts of Illinois seem to have been perfectly ready, willing, and able to protect Esmail against Mayor Macrane, powerful state or local officials are not infrequently able to overawe state or local courts.

53 F.3d at 180.

In sum, the Sixth Circuit's decision is fundamentally flawed, as a matter of law and policy, and even contradicts a prior decision of that court. The narrow scope the Sixth Circuit assigned to the Equal Protection Clause has been rejected by the First, Second, Seventh, Eighth and Tenth Circuits; and no court facing the question has endorsed the Sixth Circuit's limitation on the reach of the Equal Protection Clause. Certiorari should be granted to resolve the conflict between the circuits created by the Sixth Circuit's decision in this case and to decide a fundamental issue of constitutional law.

CONCLUSION

For the above reasons, Mr. Futernick respectfully requests that this Court grant a writ of certiorari, and, upon full review by this Court, the court of appeals' affirmance of the dismissal of Mr. Futernick's claims against Caterino and the directors of MDNR and MDPH should be reversed.

Respectfully submitted,

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Dated: July 17, 1996

Sheldon M. FUTERNICK, d/b/a Holiday West Mobile Home Park and d/b/a Holiday Woods Mobile Home Park, Plaintiff-Appellant,

v.

SUMPTER TOWNSHIP, Helen Teall, Barbara Dudek, Arness Cox and Louis Banotai, Sumpter Township Trustees; Marvin Banotai, Township Supervisor; Paul Johnson, Deputy Supervisor and Township Administrator; Joan Oddy, Township Clerk; John Morgan, Township Treasurer; Michigan Department of Natural Resources, Roland Harmes, Director; Michigan Department of Public Health, Vernice Davis Anthony, Director; Jon Caterino; and Michigan Mobile Home Commission, Defendants-Appellees.

No. 94-1902.

United States Court of Appeals,
Sixth Circuit.

Argued Feb. 6, 1996.

Decided March 13, 1996.

On Appeal from the United States District Court for the Eastern District of Michigan; Nancy G. Edmunds, Judge.

Mark A. Goldsmith (argued and briefed), Honigman, Miller, Schwartz & Cohn, Detroit, MI, for Sheldon Futernick.

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John C. Scherbarth, Asst. Attorney Gen. (argued and briefed), Office of the Attorney General, Natural Resources Div., Lansing, MI, for Michigan Dept. of Natural Resources, Michigan Mobile Home Com'n.

R. Phillip Brown (argued and briefed), Office of the Attorney General, Lansing, MI, for the Michigan Dept. of Public Health.

Before: MERRITT, Chief Judge, and CONTIE and BOGGS, Circuit Judges.

BOGGS, Circuit Judge.

Sheldon Futernick sued indiscriminately a host of state and local officials involved in regulating two mobile home parks that he owns and operates. He appeals from the district court's order dismissing all of his claims under Fed.R.Civ.P. 12(b)(6). Although we reverse the district court's erroneous decision regarding the Eleventh Amendment immunity of some of the named defendants, we affirm the district court's dismissal of all of Futernick's claims.

I

Sheldon Futernick owns and manages two mobile home parks in Sumpter Township, Holiday Woods and Holiday West. His parks discharge treated sewage effluent into surface water, pursuant to a permit issued by the

Michigan Department of Natural Resources (MDNR).[1] On March 20, 1991, MDNR amended the permit to require substantial modifications to Futernick's mobile home parks by February 1, 1993. ("This was the most stringent permit issued to any mobile home park in . . . the entire state of Michigan," complains Futernick in his brief to this court, estimating the cost of compliance to be over $700,000.) Futernick took little or no action in regard to the new permit requirements for at least a year.

In July 1992, Futernick had a series of meetings with Sumpter Township Supervisor Marvin Banotai to discuss a Township plan to construct a sewer system. The original plan included a sewer line running near Holiday West, but no line running near Holiday Woods. Futernick asked if a line could be extended to Holiday Woods, and Banotai agreed. Banotai sent confirming letters to Futernick announcing the plan to build a sewer accessible to both parks, and stating that the parks would be required to connect to the system.

Futernick then went to the state regulators and informed them that he planned to hook up to the Township sewer system – rendering unnecessary the costly improvements that his amended permit would require by February 1, 1993. Futernick's engineer, Seydou Diop, met with Barry Burns of the MDNR and Jon Caterino of the Michigan Department of Public Health (MDPH).[2] Diop

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[1] MDNR recently changed its name to the Department of Environmental Quality (DEQ), but we use the old name in this opinion.

[2] Although MDNR is responsible for issuing permits, MDPH is responsible for visiting sites and monitoring compliance. The local MDPH regulator is Jon Caterino.

summarized the results of the meeting in a letter to Burns and Caterino, dated August 19, 1992:

> Holiday Woods MPH [mobile park homes] will continue to operate as they are currently under the effluent limitations and monitoring requirements as set forth on page 2 of the current permit pending connection to the Sumpter Township sewer system.

Neither Burns nor Caterino voiced disagreement with this summary of their position immediately, and Futernick took no steps to upgrade his parks to meet the tougher effluent regulations.

On October 27, 1992, Caterino wrote Futernick, suggesting that the facility improvements would not be necessary if Futernick used the Township's sewer system, but also said that he had no "firm knowledge" that the Township planned to build such a system. He asked Futernick to begin the facility improvements necessary for compliance. Futernick responded by letter on November 4, stating that he interpreted Caterino's silence in light of the Diop letter to be an agreement to forestall regulation of Holiday Woods "until the Township brings the sewer to the Park and the Park has connected to the Township sewer."

Meanwhile, Futernick and the Township began to disagree on the terms of their earlier understanding. The Township says that Futernick promised to pay for the extension of the sewer line to Holiday Woods. Futernick denies that he promised to pay to connect either park to the new sewer line. The parties also disagree as to whether the Township obligated itself unconditionally to build the sewer line, or merely announced a potential

plan. Sometime in early November 1992, Futernick told Township engineers that he would not pay for the extension of the sewer line to either of his parks. In response, the engineers stopped work on the proposed extension.

Everyone involved – Caterino (MDPH), Burns (MDNR), the Township, some county officials, Futernick, and Diop – met on November 17 at the request of Caterino. Futernick and Diop were only allowed to attend part of the meeting. At this meeting, the Township refused (for the first time, says Futernick; again, says the Township) to build the sewer to Futernick's parks unless Futernick paid a hook-up fee. Caterino and Burns also refused to excuse Futernick from compliance with the new regulatory permit unless Futernick agreed to do what was necessary to hook up to the Township's sewers.

The parties' various positions became further entrenched at a second meeting (this time without Futernick or Diop) on December 1, 1992. At this meeting, the Township told the state regulators the amount of the hook-up fee they required, and Caterino and Burns decided that Futernick would have to sign a contract agreeing to pay this amount before he would be excused from his state regulatory obligations. Apparently, the Township was under significant time pressure because of a commitment to their sewage processing contractor. The Township and the state regulators set a deadline of December 31, 1992, for Futernick's financial commitment. Futernick received letters to this effect on December 4, 9, 10, and 14.

Futernick did nothing. On February 3, 1993, Caterino issued a Notice of Noncompliance concerning Futernick's

effluent discharge permit. On February 23, Caterino issued a Certificate of Noncompliance, which is the first step in a series of government actions that could eventually result in the closing of the mobile home park.

On March 9, 1993, Futernick filed his complaint in this action. He sued the Township and various Township officials, pursuant to 42 U.S.C. § 1983 and various state laws, to enjoin them from constructing a sewer system that did not include free hook-up status for Futernick. All claims against the Township were settled. Futernick agreed to pay $650,000 in hook-up fees ($400,000 for Holiday Woods and $250,000 for Holiday West), and the Township agreed to provide him with sewer service. The settlement was entered into the record of the proceedings. The district court dismissed the claims against the Township with prejudice. After Futernick moved for reconsideration, the district court amended its order so that the dismissal would be without prejudice.

Futernick also sued under § 1983 for injunctive relief against MDNR, MDPH, and Caterino, and for money damages against Caterino only, for violation of his right to equal protection of the law under the Fourteenth Amendment. On a Rule 12(b)(6) motion by the defense, the district court dismissed the claims against MDNR and MDPH on grounds of Eleventh Amendment immunity. The district court dismissed the claim for money damages against Caterino on grounds of qualified immunity. The court dismissed the claim for injunctive relief against Caterino because Caterino was merely enforcing a facially neutral state regulation and, therefore, the complaint failed to state a claim upon which relief could be granted.

Futernick filed a timely notice of appeal. He raises three issues that we now address. First, did the district court err by dismissing the claims against the Township because of the settlement? Second, did the court err by dismissing the claims against the directors of MDNR and MDPH on grounds of Eleventh Amendment immunity? Third, did the court err by dismissing the claims against Caterino because the complaint failed to state a claim upon which relief could be granted?

II

The district court dismissed the claims against the Township without prejudice. Futernick claims that this dismissal was an impermissible alteration of the parties' settlement agreement, contrary to *Brown v. County of Genesee*, 872 F.2d 169 (6th Cir.1989) (court not permitted to change terms of a settlement before enforcing it). Futernick claims that the terms of the settlement required the court to retain jurisdiction of the case until the Township built the sewer line and hooked up Futernick. *See Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400, 405 (7th Cir.1974) (holding that district court abused discretion to dismiss case with prejudice when dismissal with prejudice was contrary to parties' settlement agreement), *cert. denied*, 421 U.S. 978, 95 S.Ct. 1980, 44 L.Ed.2d 470 (1975).

Futernick's argument fails because the settlement agreement says that the case will be stayed "with the court's permission."[3] Futernick argues that, despite this

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[3] The oral settlement agreement was read into the record of the proceedings below. The relevant portion of the agreement is set out at Appellant's Brief 4-6.

language, the court's acceptance of the settlement agreement *implied* that a stay would be granted. We do not believe that mere acceptance of a settlement agreement overcomes its express language – and therefore we will not conclude that the court's decision to dismiss is a "violation" of an agreement in which the court made no promise to the parties. Furthermore, the dismissal of the case without prejudice does not leave Futernick without an adequate remedy if promises made in the settlement agreement are not kept by the Township. At oral argument, counsel for Futernick admitted that an action for breach of contract has been filed in Michigan state court. Additionally, because the dismissal was without prejudice, Futernick remains free to renew his action in federal court.[4]

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[4] Futernick may not be able to seek contempt sanctions against the Township immediately, as he would have been able to had the district court retained jurisdiction or incorporated the settlement agreement into the order of dismissal. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. ___, ___, 114 S.Ct. 1673, 1677, 128 L.Ed.2d 391 (1994), held that a federal court does not have jurisdiction to enforce a settlement agreement reached in a dismissed action unless that settlement agreement was incorporated into the order of dismissal. But Futernick remains able, because the dismissal was without prejudice, to bring another § 1983 action in the same district court, if he can state a cognizable constitutional claim. Absent a showing as to why the threat of contempt sanctions is immediately needed, there is no reason for us to conclude that the combined effect of these state and federal remedies is inadequate for Futernick's purposes.

III

Futernick's next allegation of error is essentially correct. The district court should not have dismissed the claims for injunctive relief against the directors of MDNR and MDPH on grounds of Eleventh Amendment immunity. Eleventh Amendment immunity does not bar injunctive relief against state officials for violations of federal law. *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908); *Thomson v. Harmony*, 65 F.3d 1314, 1320 (6th Cir.1995).

The district court held that Young did not apply because Futernick sued the directors in their official capacity, and sought relief from the department, rather than the directors themselves. That holding appears to be a confused extension of the rule that the Eleventh Amendment bars a suit against a state officer if that suit would lead to monetary relief against the state treasury (by some means other than indemnification). The court's confusion probably stems from *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1983):

> The Eleventh Amendment bars a suit against state officials when the state is the 'real, substantial party in interest.' . . . regardless of whether [the plaintiff] seeks damages or injunctive relief.

Id. at 101-02, 104 S.Ct. at 908-09. It is error to read the language about the "party in interest" as an extension of Eleventh Amendment immunity to actions seeking injunctive relief against a state officer who is violating federal law. *Thomson*, 65 F.3d at 1320. To the extent the

text of *Pennhurst* supports such a reading, it is overruled by *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). *Will* reaffirmed that state officers who are violating a federal law may *always* be sued for purely injunctive relief – "capacity" and "party in interest" are irrelevant. *Id.* at 71 n. 10, 109 S.Ct. at 2312 n. 10.[5]

Although the state agency defendants are not entitled to Eleventh Amendment immunity, we still affirm the dismissal of the case against these defendants. Futernick alleges (only) that these defendants violated his equal protection rights by selectively enforcing facially valid state environmental regulations. We affirm the dismissal of this case against these defendants for the same reason that we affirm the dismissal of the case against Jon Caterino in his personal capacity, as discussed immediately below: Futernick fails to state a claim upon which relief can be granted.

IV

The heart of Futernick's case is the claim that state officials, especially Jon Caterino of MDNR, violated his

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[5] The directors also argue that only the officer with immediate control over the challenged act or omission is amenable to § 1983. We find this claim ridiculous. Such a rule would allow a state agency to avoid, or defer, liability merely by transferring the defendant in a particular case, or by changing the scope of the defendant official's authority. The directors of a state agency, no matter how far removed from the actions of agency employees, are proper parties to a suit for an *injunction* under § 1983.

constitutional right to equal protection of the law by selectively enforcing Michigan state environmental regulations. The district court dismissed the claim for injunctive relief against Caterino for failure to state a claim.[6] We review *de novo* to determine whether the complaint alleges "the material elements to sustain a recovery under some viable legal theory." *Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1240 (6th Cir.1993) (citation omitted).

There is no right under the Constitution to have the law go unenforced against you, even if you are the first person against whom it is enforced, and even if you think (or can prove) that you are not as culpable as some others who have gone unpunished. The law does not need to be enforced everywhere to be legitimately enforced somewhere; and prosecutors have broad discretion in deciding whom to prosecute. *Cf. Wayte v. United States*, 470 U.S. 598, 607, 105 S.Ct. 1524, 1530, 84 L.Ed.2d 547 (1985) (government's choice to prosecute only those draft violators who inform government of their intention not to register is not a violation of equal protection).

Sometimes the enforcement of an otherwise valid law can be a *means* of violating constitutional rights by invidious discrimination. To address this problem, courts

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[6] The court dismissed the money damages claim against Caterino on grounds of qualified immunity. Since a holding that Futernick failed to state a claim for constitutional relief under Rule 12(b)(6) necessarily includes a holding that Futernick cannot show that Caterino violated a constitutional right of which any reasonable official in his situation would have been aware, it seems prudent to address the 12(b)(6) dismissal first.

have developed the doctrine of selective enforcement. Usually, a claim of selective enforcement arises as a defense in a criminal prosecution or regulatory enforcement action. In this context, the court should dismiss a case, or take other appropriate action, if the defendant can prove that the prosecutor or investigator intentionally "singled him out" for punishment because of membership in a protected group or the exercise of a constitutionally protected right. *United States v. Anderson*, 923 F.2d 450, 453 (6th Cir.1991) (criminal prosecution); *Schehl v. Comm'r of Internal Revenue Serv.*, 855 F.2d 364, 367 (6th Cir.1988) (civil action for penalties).[7]

Selective enforcement can also lead to § 1983 liability if the plaintiff pleads "purposeful discrimination"

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[7] We have differentiated the two types of selective prosecution claims. True "selective prosecution" requires the plaintiff to show: (1) membership in a protected group; (2) prosecution; (3) that others in a similar situation not members of the protected group would not be prosecuted; and (4) that the prosecution was initiated with discriminatory intent. *Anderson*, 923 F.2d at 453. "Vindictive prosecution" is prosecution to deter or punish the exercise of a constitutionally protected right. The plaintiff must show: (1) exercise of a protected right; (2) the prosecutor's "stake" in the exercise of that right; (3) the unreasonableness of the prosecutor's conduct; and, presumably, (4) that the prosecution was initiated with the intent to punish the plaintiff for exercise of the protected right. *Ibid. See also United States v. Hazel*, 696 F.2d 473 (6th Cir.1983) (holding that prosecution of particularly notorious tax evaders is not a violation of equal protection because prosecution was motivated by notoriety of offenders, not the offender's actual speech); *United States v. Andrews*, 633 F.2d 449, 457 (6th Cir.1980) (Merritt, J., dissenting, discussing requirements for a valid vindictive prosecution claim).

intended to accomplish some forbidden aim. *Birth Control Ctrs., Inc. v. Reizen*, 743 F.2d 352, 359-60 (6th Cir.1983) (affirming trial court's finding that state officials did not *intentionally* discriminate against abortion clinics when enforcing surgical clinic licensing regime); *Wright v. MetroHealth Medical Ctr.*, 58 F.3d 1130, 1137 n. 7 (6th Cir.1995) (dismissing plaintiff's claim that hospital selectively enforced employment policy because plaintiff did not allege any impermissible intent). *See generally Oyler v. Boles*, 368 U.S. 448, 456, 82 S.Ct. 501, 506, 7 L.Ed.2d 446 (1962) ("the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation" if "the selection was [not] deliberately based upon an unjustifiable standard").

This circuit has not squarely addressed the question of what aims are forbidden ones for the purposes of a selective enforcement action under § 1983. It seems clear to us that intentional selective enforcement because of race, nationality, religion, or gender is grounds for § 1983 relief. *Oyler* itself says "race, religion, or other arbitrary classification." 368 U.S. at 456, 82 S.Ct. at 506. The term "arbitrary classification" implies that certain other group distinctions could be a basis for liability – such as the alleged focus on abortion clinics in *Birth Control Centers*, 743 F.2d at 359. Protecting certain other groups from selective enforcement may fit the slightly heightened "rational basis scrutiny" given to suspicious classifications by equal protection jurisprudence generally. *See, e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (striking requirement that home for the mentally retarded obtain a special use permit); *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 72

L.Ed.2d 786 (1982) (striking Texas law excluding immigrants from free public education).[8]

It is also clear that selective enforcement intended to discourage or punish the exercise of a constitutional right, especially the right to criticize the government, is sufficient basis for § 1983 relief. The availability of § 1983 relief for what we have called "vindictive enforcement," *Anderson*, 923 F.2d at 453, seems a necessary corollary to the defense recognized in free speech cases like *Wayte*, 470 U.S. at 608-10, 105 S.Ct. at 1531-32, and *Hazel*, 696 F.2d at 473. Of course, as the eventual failure of the plaintiffs' claims in *Wayte* and *Hazel* indicates, the plaintiff must prove intent to punish for the act of speech, rather than intent to concentrate limited resources on the most notorious or easy to locate violators.

Futernick, however, does not claim to be a member of any group, nor does he claim that Caterino is punishing him for exercising a constitutional right. Instead, he claims that relief under § 1983 is available because Caterino selectively enforced the law "maliciously" and in "bad faith."[9] This circuit has not yet decided if an

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[8] On the other hand, every "arbitrary classification" cannot be a basis for liability. Mere arbitrariness – prosecuting everyone whose first name begins with the letter A, for example – does not indicate any constitutionally impermissible intent. *E & T Realty v. Strickland*, 830 F.2d 1107, 1114 (11th Cir.1987). In fact, random choice may be one of the *most* sensible methods to allocate "equally" finite enforcement resources.

[9] The complaint alleges "purposeful discrimination aimed specifically" at Futernick, without any allegation of impermissible intent. Complaint at 15. In his arguments below and in briefs to this court, Futernick expounds on the otherwise

allegation of malice is sufficient to state a claim of selective enforcement. Futernick argues that we have, citing *United States v. Bustamante*, 805 F.2d 201, 202 (6th Cir.1986), where we stated that a plaintiff must show "bad faith." Futernick neglects to mention that *Bustamante* defined "bad faith" as "based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of his constitutional rights." *Ibid.* The question remains open whether malice or personal animosity is a constitutionally impermissible consideration.[10]

The First and Second Circuits have stated that they will allow § 1983 relief against a state official who selectively enforces a law or regulation out of malice, but without the intent to injure a group or punish the exercise of a constitutional right. *E.g., LeClair v. Saunders*, 627 F.2d 606, 610 (2nd Cir.1980) (Sec. 1983 action can be based on group membership, the exercise of fundamental rights, *or* "malicious or bad faith intent to injure a person"). To our knowledge, however, neither court, despite the citation of general language indicating the possibility of a successful action, has ever affirmed a victory for the plaintiff on such a theory. *See Yerardi's Moody Street Restaurant & Lounge v. Board of Selectmen*, 932 F.2d 89, 92-94 (1st

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insufficient allegation in his complaint. He alleges "malice" and "bad faith," and supplies two possible motives for Caterino's actions: first, that Caterino personally dislikes Futernick; and second, that Caterino is conspiring with the Township to allow the Township to charge Futernick an exorbitant sewer hook-up fee.

[10] We also suggested that such a claim would be possible in dicta in a footnote in *Wright*, 58 F.3d at 1137 n. 7.

Cir.1991) (defendant city board entitled to directed verdict because evidence of malice was insufficient); *Yerardi's Moody Street Restaurant & Lounge v. Board of Selectmen*, 878 F.2d 16, 20-21 (1st Cir.1989) (individual defendants entitled to qualified immunity); *Rubinovitz v. Rogato*, 60 F.3d 906, 911 (1st Cir.1995) (affirming grant of summary judgment because evidence of malice is insufficient); *LeClair*, 627 F.2d at 606 (reversing judgment for plaintiff at trial because evidence of malice is insufficient); *FSK Drug Corp. v. Perales*, 960 F.2d 6, 10 (2d Cir.1992) (affirming grant of summary judgment because evidence of malice insufficient). *See also Rubinovitz*, 60 F.3d at 911-12 (successful claims for malicious prosecution in violation of the equal protection clause should be "infrequent"); *Cornett v. Sheldon*, 894 F.Supp. 715, 723 (S.D.N.Y.1995) (dismissing claims for selective prosecution because conclusory allegation of malice in complaint not supported by the allegation of specific facts).

We cited the Second Circuit's statement in *FSK Drug* in dicta in *Wright v. MetroHealth Medical Center*, 58 F.3d 1130, 1137 n. 7 (6th Cir.1995). In *Wright*, however, the issue of selective enforcement was not addressed because the plaintiff did not raise it below, and because the plaintiff made *no* allegation as to the defendant's intent. Now that we are presented with the facts of an actual case, we believe that it would be unwise to adopt the often-stated, but never-used, rule of the First and Second Circuits.[11]

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[11] Other circuits that have stated the prima facie case for a claim of selective enforcement have not mentioned malice or intent to injure an individual on the part of the prosecutor or regulator. *E.g., Government of the Virgin Islands v. Harrigan*, 791

The Supreme Court in *Oyler* mentions only arbitrary *classifications* as a basis for selective enforcement liability. 368 U.S. at 456, 82 S.Ct. at 506. *Accord Wayte*, 470 U.S. at 608 n. 10, 105 S.Ct. at 1531 n. 10 (citing *Castaneda v. Partida*, 430 U.S. 482, 494-95, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498 (1977) and *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886)). We do not believe that choosing to enforce the law against a particular individual is a "classification" as that term is normally understood. *Webster's Third New International Dictionary* 417 (1986) (defining "classify" as "to group or segregate in classes that have systematic relations usually founded on common properties or characters; sort").

Furthermore, we see compelling reasons that the sundry motivations of local regulators should *not* be policed by the Equal Protection Clause of the United States Constitution, absent the intent to harm a protected group or punish the exercise of a fundamental right. The sheer number of possible cases is discouraging. Legislatures often combine tough laws with limited funding for enforcement. A regulator is required to make difficult, and often completely arbitrary, decisions about who will bear the brunt of finite efforts to enforce the law. As a result, even a moderately artful complaint could paint almost any regulatory action as both selective and mean-spirited.

F.2d 34, 36 (3d Cir.1986) (forbidden aims include intent to injure a group and intent to punish exercise of fundamental rights); *Stern v. Tarrant County Hosp. Dist.*, 778 F.2d 1052, 1058 (5th Cir.1985) (same); *E & T Realty v. Strickland*, 830 F.2d 1107, 1114 (11th Cir.1987) (Sec. 1983 plaintiff must show intent to injure group).

Recognizing this dilemma, the First Circuit limits the availability of § 1983 for a regulator's malice by requiring that the plaintiff prove that others who are similarly situated in "all relevant aspects" have not been regulated. *Rubinovitz*, 60 F.3d at 910 (citing *Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 19 (1st Cir.1989)). Strict adherence to this initial requirement allows only cases of *extraordinary* selectivity to state a claim. However, we are uncertain if a focus on similarly situated persons works as a screening device. Determining "all relevant aspects" of similar situations usually depends on too many facts (and too much discovery) to allow dismissal on a Rule 12(b)(6) motion. If we require defendants to wait until summary judgment, we burden local and state officials with the regular prospect of "fishing expeditions" and meritless suits.[12] In the meantime we federalize and

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[12] Futernick's claim is typical. After apparently mammoth discovery from the Township and the state, Futernick has accumulated evidence that other mobile home parks in the area discharged sewage into the ground water without a permit. The record also contains evidence that other mobile home parks in the area were excused from sewage regulations on vague promises that they would hook up to the local sewer system.

The state defendants can easily rebut this evidence and show that Futernick is not "similarly situated" – essentially a demonstration that there is some rational reason why prosecuting only Futernick makes sense. As to the discharge of effluent without a permit by other mobile home parks, Caterino cannot regulate these parks because his jurisdiction is limited to enforcing the conditions of permits already issued by MDNR. As to Caterino's decision to excuse other mobile home parks on the vague promise of hook-up to local sewer systems, none of the other mobile homes have expressly refused to pay hook-up fees as has Futernick. Eventually winning these points,

constitutionalize what are essentially issues of local law and policy.

The nature of the right to equal protection also counsels against expanding a federal right to protection from non-group animosity on the part of local officials. It is clearly not a violation of equal protection if a local regulator, faced with limited resources, picks people to regulate in a perfectly random manner. *Supra* n. 8. Similarly, the presence of personal animosity should not turn an otherwise valid enforcement action into a violation of the Constitution. From a constitutional perspective, personal animosity not related to group identity or the exercise of protected rights is as *random* as the roll of a dice. There is no constitutionally significant category of people that have a greater or lesser chance of being affected by it. The Constitution's protection begins only when the *incidence* of the burden of regulation becomes constitutionally suspicious.

We certainly do not sanction the abuse of state or local regulatory power. Regulation out of personal dislike or vendetta is repugnant to the American tradition of the rule of law. However, the states themselves are vibrant defenders of this tradition. *Cf. Alfaro Motors, Inc. v. Ward,* 814 F.2d 883, 888 (2d Cir.1987). ("Section 1983 is not a means for litigating in a federal forum whether a state or local administrative decision was arbitrary and capricious.") Those affected by the unfair regulator have recourse to the state political processes that appointed

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however, does not relieve the Township – or any future defendant – of the burden of producing the documents and litigating the suit up to the point of dismissal.

that regulator in the first place. State courts or the state constitution may provide protection. Additionally, in extreme cases, the defendant in a regulatory action may have federal due process claims, reviewable by the Supreme Court of the United States by writ of certiorari. *Cf. Sun Valley Foods v. Ficano,* 801 F.2d 186, 189 (6th Cir.1986) (defendant in enforcement action cannot retry case in federal court simply by invoking § 1983; federal courts have no jurisdiction to hear cases proceeding in state court or decided by state courts, and state court defendant's only recourse is possible Supreme Court review). Absent a breakdown in the state's normal political process that unfairly affects a protected group or the exercise of constitutional rights, we can and should trust states to police adequately their own processes.

Our discussion suggests that there is a difference between the general doctrine of equal protection – relevant when the plaintiff is challenging a classification made by state law – and the doctrine of selective enforcement. When the plaintiff challenges a classification made by state law, the state must show that the classification is rationally related to a legitimate state purpose, regardless of the nature of the classification or the persons it affects. *See, e.g., McLaughlin v. Florida,* 379 U.S. 184, 191, 85 S.Ct. 283, 288, 13 L.Ed.2d 222 (1964) ("The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose.").[13] In selective enforcement doctrine, however, the

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[13] That requirement is often criticized because courts change the potency of rational basis scrutiny according to the outcome that will result from its application, *see generally,*

characteristics used to select some people to prosecute or regulate need not be rationally related to a state need. The difference is due to the discretion to initiate government action traditionally given state officials. It is also due to the legitimate and practical necessity for a state somehow to choose to prosecute or regulate only part of the group of people who may be violating the law, and to do so without subjecting the selection decision to micromanagement by courts.

For these reasons, we hold that the choice of whom to prosecute or cite for a violation of an otherwise valid law or regulation is constitutionally troublesome only when it is blemished by the intent to harm a protected group or punish a person for the exercise of a constitutionally protected right. Because Futernick does not allege either of these forbidden aims, his § 1983 action fails to state a claim upon which relief can be granted.

V

Although the district court erred by holding that the directors of MDNR and MDPH were entitled to sovereign immunity, we AFFIRM the dismissal of the entire action.

Laurence H. Tribe, *American Constitutional Law* 1443-50 (2d ed. 1988) (courts "covertly" heighten scrutiny as classifications become more suspect, and lower scrutiny as classifications become more mundane), but it remains the general method of equal protection analysis.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHELDON M. FUTERNICK, d/b/a HOLIDAY WEST MOBILE HOME PARK and d/b/a HOLIDAY WOODS MOBILE HOME PARK,

Plaintiff, Case No. 93-71013

v. Hon. Nancy G. Edmunds

SUMPTER TOWNSHIP; HELEN TEALL, BARBARA DUDEK, ARNESS COX and LOUIS BANOTAI, Sumpter Township Trustees; MARVIN BANOTAI, Township Supervisor; PAUL JOHNSON, Deputy Supervisor and Township Administrator; JOAN ODDY, Township Clerk; JOHN MORGAN, Township Treasurer; MICHIGAN DEPARTMENT OF NATURAL RESOURCES, ROLAND HARMES, Director; MICHIGAN DEPARTMENT OF PUBLIC HEALTH, VERNICE DAVIS ANTHONY, Director; JOHN CATERINO and MICHIGAN MOBILE HOME COMMISSION,

Defendants.

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ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

This matter came before the court on Defendants' motions to dismiss. On March 31, 1993, defendants Michigan Department of Public Health ("MDPH"), Vernice Davis Anthony, and Jon Caterino filed a motion to dismiss. On April 5, 1993, defendants Michigan Department of Natural Resources ("MDNR"), Roland Harmes, and

Michigan Mobile Home Commission ("MMHC") filed a motion to dismiss. Plaintiff filed a response to both motions on April 13, 1993. Defendants filed one reply on April 26, 1993. Oral argument was heard April 28, 1993. After being advised by the parties that a settlement could be reached, the court conducted seven settlement conferences between May 5, 1993, and February 1, 1994. Although the parties failed to reach a settlement with regard to claims against the state defendants, they did reach a resolution with regard to claims against the township defendants. At the February 1, 1994 settlement conference, the court granted Plaintiff's request to file a supplemental response to the two pending motions to dismiss. Plaintiff filed his supplemental brief March 1, 1994; and Defendants filed a supplemental brief March 15, 1994. For the reasons that follow, the court will grant Defendants' motions.

I. Facts

Plaintiff Sheldon Futernick owns two mobile home parks, Holiday Woods and Holiday West, in Sumpter Township. Both parks use on-site wastewater treatment systems, and both parks had been required to renovate those systems. The need for renovations would be eliminated, however, if municipal sewer service were available. The instant suit was filed after Sumpter Township Board of Trustees adopted a sewer route which included neither of Plaintiff's parks. Under the route adopted by the township board on February 9, 1993, no mobile home park had direct access to the sewer system; however, any park could connect to the system by constructing a lateral line.

II. Standard of Review

In considering a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, this court "must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief." *In re Delorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1993). The complaint must include direct or indirect allegations " 'respecting all the material elements to sustain a recovery under *some* viable legal theory.' " *Id.* (citations omitted) (emphasis in original).

IV. Applicable Law

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

U.S. Const. amend. XI. The Eleventh Amendment has been interpreted by the United States Supreme Court to bar suits against a state by its own citizens. *Edelman v. Jordan*, 415 U.S. 651 (1974). In *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89 (1983), the Court stated, "It is clear, of course, that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." *Id.* at 100-101. The Court added, "This jurisdictional bar applies regardless of the nature of the relief sought." *Id.* at 101 (citation omitted).

State officials sued in their official capacities also share Eleventh Amendment immunity.

> The Eleventh Amendment bars a suit against state officials when the state is the 'real, substantial party in interest., Thus, '[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.' And, as when the State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief.

Id. at 101-102 (citations omitted). The only exception to this rule is when a state official acts unconstitutionally. *Id.* at 102; *Ex parte Young,* 209 U.S. 123 (1908).

The doctrine of qualified immunity recognizes the need of government officials to be free from harassing lawsuits and apprehension of personal liability when they exercise authority and discretion while performing their jobs in the public interest. *Butz v. Economou,* 438 U.S. 478 (1987). In *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), the Supreme Court substantially limited the subjective component of the qualified immunity analysis in favor of an objective standard.

> We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive

> disruption of government and permit the resolution of many insubstantial claims on summary judgment.

Id. at 818 (citations and footnote omitted).

In *Poe v. Haydon*, 853 F.2d 418 (6th Cir. 1988), the United States Court of Appeals for the Sixth Circuit elaborated on *Harlow* and addressed the issue of whether inquiry into an official's motive or intent is necessary when conducting a qualified immunity analysis.

> 'Because the [*Harlow*] Court did not . . . purge substantive constitutional doctrine of all subjective issues, it did not entirely eliminate subjective inquiry from every qualified immunity analysis: some right . . . might be violated by actions undertaken for an impermissible purpose but not by the same actions undertaken for permissible purposes.' Thus, 'in deciding whether a defendant is entitled to qualified immunity in cases in which unlawful motive is a critical element, the court must consider that actor's intent in carrying out the act that is alleged to have resulted in the violation of the plaintiff's rights.'

Poe, at 432 (citations omitted).

Plaintiff's equal protection claim is based upon allegations of selective enforcement of Plaintiff's permit provisions. However, selective enforcement of the law is not, in itself, a constitutional violation. *Oyler v. Boles*, 368 U.S. 448 (1962). In *United States v. Hazel*, 696 F.2d 473 (6th Cir. 1982) the Sixth Circuit quoted from *Boles* as follows:

> '[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in

> this case may imply a policy of selective enforcement, it was not stated that the selection was based upon an unjustifiable standard such as race, religion or other arbitrary classification. Therefore grounds supporting a finding of a denial of equal protection were not alleged.' 368 U.S. at 456.
>
> Accordingly, it has been held that a defendant asserting selective prosecution: ' . . . bears the heavy burden of establishing, at least *prima facie,* (1) that while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, *and* (2) that the government's discriminatory selection of him has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of his constitutional rights.' *United States v. Berrios,* 501 F.2d 1207, 1211 (2d Cir. 1974) (emphasis added).

696 F.2d at 474.

In *Henry v. Metropolitan Sewer Dist.*, 922 F.2d 332 (6th Cir. 1990), the Sixth Circuit addressed an equal protection claim brought pursuant to 42 U.S.C. § 1983. " 'To state a claim under the Equal Protection Clause, a § 1983 plaintiff must allege that a state actor intentionally discriminated against the plaintiff because of membership in a protected class.' " *Id.* at 341 (quoting *Johnson v. Morel,* 876 F.2d 477, 479 (5th Cir. 1989) (en banc).

V. Analysis

Plaintiff conceded that defendants MDNR and MMHC have immunity from suit in federal court for money damages and declaratory or injunctive relief pursuant to the Eleventh Amendment. Plaintiff's resp. br. at 3. Accordingly, they are entitled to dismissal pursuant to Rule 12(b)(1).

Defendant Harmes, director of MDNR, also has Eleventh Amendment immunity from suit in federal court for money damages and declaratory or injunctive relief. Although an exception to such immunity exists for state officials who have acted unconstitutionally, this exception does not apply to Harmes because the complaint failed to allege any unconstitutional acts by Harmes. Rather, the complaint merely identified him as director of MDNR. Furthermore, the prayer for relief contained no request for injunctive relief against Harmes; rather, the requested relief was against the Department. Accordingly, defendant Harmes is entitled to dismissal pursuant to Rule 12(b)(1).

Plaintiff conceded that MDPH has Eleventh Amendment immunity from suit in federal court for money damages and declaratory or injunctive relief. Plaintiff's resp. br. at 1. Plaintiff further indicated that he seeks no damages against defendant Davis. *Id.* Accordingly, defendants MDPH and Davis are entitled to dismissal pursuant to Rule 12(b)(l).

Thus, all that remains of Plaintiff's complaint are Counts III and IV as they pertain to defendant Jon Caterino. Count III alleged that defendant Caterino deprived Plaintiff of equal protection under the law

through selective enforcement of administration of the law with regard to waste water treatment and disposal facilities at the two mobile home parks and through purposeful discrimination. Count IV alleged a violation of 42 U.S.C. § 1983, presumably on the same basis.

The court finds that defendant Caterino is entitled to qualified immunity on these counts. As a government official performing discretionary functions, defendant Caterino is shielded from liability if his conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1987). Assuming Plaintiff's allegations are true, defendant Caterino was acting pursuant to valid state law by enforcing the provisions of a valid permit with which Plaintiff had not complied. Therefore, his action was objectively reasonable.

Selective enforcement violates the equal protection clause only if such enforcement is based on a suspect classification or has no rational relationship to a legitimate state purpose. *United States v. Hazel*, 696 F.2d 473, 474 (6th Cir. 1982). In the instant action Plaintiff failed to allege that he is a member of a protected class. In addition, enforcement of policies and regulations regarding wastewater treatment systems has a rational relationship to a legitimate state purpose. Thus, defendant Caterino is entitled to dismissal on Plaintiff's equal protection and section 1983 claims. *Henry v. Metropolitan Sewer Dist.*, 922 332, 341 (6th Cir. 1990).

VI. Conclusion

It is hereby **ORDERED** that Defendants' motions to dismiss are **GRANTED**.

/s/ Nancy G. Edmunds
Nancy G. Edmunds
U.S. District Judge

Dated: May 27, 1994

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHELDON M. FUTERNICK, d/b/a HOLIDAY WEST MOBILE HOME PARK and d/b/a HOLIDAY WOODS MOBILE HOME PARK,

Plaintiff,

V. CASE NO. 93-71013
HON. NANCY G. EDMUNDS

SUMPTER TOWNSHIP; HELEN TEALL, BARBARA DUDEK, ARNESS COX and LOUIS BANOTAI, Sumpter Township Trustees; MARVIN BANOTAI, Township Supervisor; PAUL JOHNSON, Deputy Supervisor and Township Administrator; JOAN ODDY, Township Clerk; JOHN MORGAN. Township Treasurer; MICHIGAN DEPARTMENT OF NATURAL RESOURCES, ROLAND HARMES, Director; MICHIGAN DEPARTMENT OF PUBLIC HEALTH, VERNICE DAVIS ANTHONY, Director; JOHN CATERINO and MICHIGAN MOBILE HOME COMMISSION,

Defendants.

_____/

ORDER OF DISMISSAL

The Court having granted the state defendants motions to dismiss and having been advised by plaintiff counsel, Robert A. Fineman, that the above entitled action has been resolved with regard to the claims against the township defendants,

IT IS THEREFORE ORDERED that the above-entitled action is DISMISSED WITH PREJUDICE AND WITHOUT COSTS.

/s/ NANCY G. EDMUNDS
NANCY G. EDMUNDS
United States District Judge

Dated: May 27, 1994

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHELDON M. FUTERNICK, d/b/a HOLIDAY WEST MOBILE HOME PARK and d/b/a HOLIDAY WOODS MOBILE HOME PARK,

Plaintiff, Case No. 93-71013

v. Hon. Nancy G. Edmunds

SUMPTER TOWNSHIP; HELEN TEALL, BARBARA DUDEK, ARNESS COX and LOUIS BANOTAI, Sumpter Township Trustees; MARVIN BANOTAI, Township Supervisor; PAUL JOHNSON, Deputy Supervisor and Township Administrator; JOAN ODDY, Township Clerk; JOHN MORGAN, Township Treasurer; MICHIGAN DEPARTMENT OF NATURAL RESOURCES, ROLAND HARMES, Director; MICHIGAN DEPARTMENT OF PUBLIC HEALTH, VERNICE DAVIS ANTHONY, Director; JOHN CATERINO and MICHIGAN MOBILE HOME COMMISSION,

Defendants.

_____/

ORDER GRANTING PLAINTIFF'S MOTION FOR RECONSIDERATION AND AMENDING MAY 27, 1994 ORDER

This matter came before the court on Plaintiff's June 7, 1994 motion for reconsideration of the court's May 27, 1994 order, which dismissed the Township defendants with prejudice. Defendants filed a response June 27, 1994; and Plaintiff filed a supplemental brief July 7, 1994. The

court, having read the pleading and being fully advised in the premises, hereby **ORDERS** that Plaintiff's motion for reconsideration is **GRANTED**. It is further **ORDERED** that the court's May 27,1994 order is hereby **AMENDED** to order dismissal of the Township defendants without prejudice.

July 12, 1994
Date

/s/ Nancy G. Edmunds
Nancy G. Edmunds
U.S. District Judge

No. 94-1902

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHELDON FUTERNICK, d/b/a HOLIDAY WOODS MOBILE HOME PARK and d/b/a HOLIDAY WEST MOBILE HOME PARK,	)	ORDER
Plaintiff-Appellant,	)	(Filed Apr. 25, 1996)
v.	)	
SUMPTER TOWNSHIP, ET AL.,	)	
Defendants-Appellees.	)	

BEFORE: MERRITT, Chief Judge; CONTIE, and BOGGS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk, pe

(2)

Supreme Court, U.S.
FILED
SEP 16 1996
CLERK

No. 96-100
In the Supreme Court of the United States
October Term, 1995

SHELDON FUTERNICK, d/b/a
HOLIDAY WEST MOBILE HOME PARK
and d/b/a HOLIDAY WOODS MOBILE
HOME PARK,

Petitioner,

v.

JON CATERINO; ROLAND HARMES,
Director, Michigan Department of Natural Resources;
and VERNICE DAVIS-ANTHONY, Director
Michigan Department of Public Health,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS CATERINO, HARMES AND DAVIS-ANTHONY IN OPPOSITION

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27 pp

QUESTIONS PRESENTED

I.

Did the complaint state a legally sufficient cause of action for selective enforcement despite its failure to allege race, religion, or other arbitrary classification?

a. Does the narrowly circumscribed definition of selective enforcement approved by this court in *Oyler v. Boles* prohibit an enforcement action that is based upon "forbidden aims," other than denial of a constitutional right or invidious discrimination?

b. Are "bad faith," "animosity" or "malice" forbidden aims for issuing a certificate of noncompliance to a violator of a valid waste-water discharge permit, where there are no allegations of intent to harm a protected group or punish a person for the exercise of a constitutionally protected right?

II.

Is lawful issuance of a Certificate of Noncompliance for Petitioner's failure to meet the terms of a valid surface waste water discharge permit objectively reasonable conduct entitled to qualified immunity, or did issuance of the certificate violate a constitutional right that was clearly defined at the time the act occurred?

III.

Does the Eleventh Amendment permit prospective injunctive relief against directors of State agencies in their official capacities absent allegations that the directors themselves are personally violating federal law or that such violations are the result of agency policy or custom?

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JURISDICTION

Respondents believe the federal courts have no subject matter jurisdiction over the claims against the State agencies and their directors. Eleventh Amendment immunity is a bar to suit which deprives the federal courts of jurisdiction. Without a finding of jurisdiction, a federal court is powerless to proceed. *Ex Parte McCardle*, 74 U.S. (7 Wall) 506 (1868); *Memphis American Fed. of Teachers v. Bd. of Ed. of Memphis*, 534 F.2d 699 (6th Cir. 1976). Therefore, the district court lacked subject matter jurisdiction of the claims against the State agencies and their directors.

COUNTERSTATEMENT OF THE CASE

1. Counterstatement of the Proceedings

The complaint in this case was filed in the United States District Court for the Eastern District of Michigan on March 9, 1993 against Sumpter Township in Michigan and six of its officers, administrators and board of trustees (the Township defendants). The complaint also named the Michigan Mobile Home Commission (MMHC); the Michigan Department of Natural Resources (MDNR) and its director, Roland Harmes; the Michigan Department of Public Health (MDPH) and its director, Vernice Davis-Anthony; and Jon Caterino (collectively referred to as the State Respondents). At that time Mr. Caterino was an MDPH employee in the Engineering and Environmental Services Section. He, MDPH and Davis-Anthony are referred to herein as the Public Health Respondents. MMHC, MDNR and director Roland Harmes are referred to herein as the Natural Resources Respondents.

The complaint attempted to state a selective enforcement cause of action under the Equal Protection Clause against all Respondents, for unequal and discriminatory administration of the law. (Complaint, ¶ 48, R 1). The complaint did not contain the "malice" and "bad faith" allegations which Petitioner raised for the first time in the Court of Appeals. See Argument 5, pp 16-18, *infra*. All the State Respondents except Mr. Caterino were sued in their official capacities for injunctive relief. Mr. Caterino is the

single State Respondent sued not only in his official capacity but also in his personal capacity for both injunctive relief and money damages.

The Public Health Respondents filed a motion to dismiss (R 5) on March 31, 1993, which was followed by a motion to dismiss the Natural Resources Respondents on April 5, 1993 (R 9). In response to the motions, Petitioner filed only a short brief unsupported by any factual matter (R 27). Oral argument was heard April 28, 1993 (R 33), but a decision was not rendered until eleven months later (R 42). During the intervening eleven months the district court conducted many settlement conferences which primarily involved Petitioner and the Township defendants.

At a Status Conference on February 1, 1994, a deadline of March 15, 1994 was set by the district court for any settlement to be finalized, after which the motions would be decided absent a settlement. At that time Petitioner sought permission from the Court to file "supplemental information of a factual nature," which was permitted to be completed by March 1, 1994 absent a settlement. On that date, Petitioner filed another brief 26 pages in length (R 36) supported by a three-ring binder of documents that looked to be about 500 pages thick (R 37).

The State Respondents' response was confined primarily to the non-factual nature of the motions to dismiss, because the time allotted for a response to Petitioner's "supplemental information of a factual nature" turned out to be wholly inadequate in light of the very large number of documents and huge amount of material filed by Petitioner with no warning to either the district court or State Respondents of the magnitude of the filing that they were contemplating. However, Respondent Caterino attached an affidavit in Appendix A to the State Respondents' district court supplemental brief (R 40) describing the actions he took, the reasons for them, and an explanation why he believes there was no purposeful discrimination.

After passage of nearly 14 months from the time the Public Health Respondents' motion to dismiss was filed--during which time the district court made a very concerted

effort to obtain a settlement of benefit to Petitioner--the Court finally issued its Order Granting Defendants' Motions to Dismiss (R 42) and Order of Dismissal (R 41), both dated May 27, 1994. The district court held that (1) Petitioner failed to state a claim against Respondent Caterino, (2) the claim against Respondent Caterino was barred by qualified immunity, and (3) the claim against all other State Respondents was barred by Eleventh Amendment immunity.

Thereafter, further motions and briefs were filed and orders issued that did not involve the State Respondents. An appeal to the United States Court of Appeals for the Sixth Circuit followed on August 8, 1994. From then until just shortly before Petitioner's brief on appeal was filed, the Court of Appeals also conducted and/or supervised numerous discussions involving primarily Petitioner and the Natural Resources Respondents to obtain a settlement of benefit to Petitioner. Despite the best efforts of both courts, Petitioner has been unable to resolve his differences with any of the State Respondents.

In an opinion issued March 13, 1996, the Court of Appeals reversed the district court's finding of Eleventh Amendment immunity and held that (1) Petitioner failed to state a claim against all State Respondents, and (2) the claim against Respondent Caterino was barred by qualified immunity. Petitioner's motion for rehearing and suggestion for rehearing *en banc* was denied April 26, 1996, the Sixth Circuit issued its Judgment on May 6, 1996, and Petitioner sought a Writ of Certiorari from this Court July 18, 1996.

2. Counterstatement of Facts.

Petitioner's entire factual claim is a fragile web of speculation, suspicion and innuendo, despite his extensive use of discovery and burdensome requests for documents under the state's Freedom of Information Act. Even with unlimited opportunity to make his case, Petitioner has failed to demonstrate that Jon Caterino--who was merely performing his duty of monitoring compliance with lawful MDNR permit provisions--did anything that can be characterized as wrongful or unlawful. Only his state of mind is alleged to have been impure under the United States Constitution.

Respondents adopt for purposes of this Court's review the statement of facts in part I of the Court of Appeals opinion in this case. (Petitioner's appendix, pp 2- 7). While Respondent Caterino does not agree with absolutely everything appearing therein, he has no disagreements that are of significance to this appeal. The only matter of importance not mentioned by the Court of Appeals is that Mr. Caterino did not even know Petitioner Sheldon Futernick (Caterino affidavit, ¶ 5; R 40), and the only "animosity" (if it can even be called that) pointed to by Petitioner (Petitioner's Court of Appeals Supplemental Brief, p 7; R 36) was directed at Irvin Futernick, Petitioner's son. This "animosity" consisted of some idle talk, prior to the beginning of a meeting, to the effect that Irwin was a difficult individual to work with and made Mr. Caterino's blood pressure rise. Nothing was said to indicate the existence of any "animosity" toward Petitioner. (Respondent Caterino's Court of Appeals Brief on Appeal, Appendices B, D and E).

REASONS FOR DENYING THE PETITION

1. There Is No Selective Enforcement Cause Of Action For "Improper Motive," And The Court Of Appeals Correctly Rejected Petitioner's Invitation To Expand Unrecognizably This Court's Own Limitations On The Definition Of Selective Enforcement.

In the introduction portion of his Statement of the Case, Petitioner injects legal argument into his factual statement and misleads this Court in the process by mischaracterizing the Court of Appeals' opinion and the parameters of his cause of action. There, Petitioner accuses the Court of Appeals of "narrowing the breadth of the Equal Protection Clause," and undermining "the fundamental fairness that the Equal Protection Clause was designed to promote," without citing "a single decision endorsing the narrow scope it assigns to the Equal Protection Clause." (Petition for Certiorari, p 2). The Court of Appeals' opinion is so characterized because it rejected Petitioner's selective enforcement cause of action "absent an allegation that claimant was targeted because of his or her membership in a 'protected group' or because of his or her exercise of a

constitutional right." (*Id.*) The essence of Petitioner's argument is that *fundamental* fairness requires he not be required to plead violation of any *fundamental* right except the Equal Protection Clause. Aside from the self-contradictory nature of his argument, Petitioner inaccurately describes both the thoughtful and well-supported Court of Appeals' opinion and the limited nature of the selective enforcement cause of action approved by this Court.

The genesis of a selective enforcement cause of action under the Equal Protection Clause was this Court's opinion in *Oyler v. Boles*, 368 U.S. 448 (1962), which made "race, religion or other arbitrary classification" a required element. 368 U.S. at 506. In *Boles*, this Court approved a definition for selective enforcement that is deliberately based on a suspect classification. The terminology "race, religion or other arbitrary classification" presupposes a class based claim.

The facts in *Boles* involved allegations by two criminal defendants that they had been denied equal protection because the West Virginia habitual criminal statute had been applied to only a minority of those subject to its provisions, which included them. Statistics showed that a high percentage of those subject to the law had not been proceeded against. This Court held that "[e]ven though the statistics in this case might imply selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." 368 U.S. at 456. Thus, this Court approved a definition of selective enforcement that could be used *only* when invidious discrimination or other suspect classification is present.

In contrast, the Court of Appeals has permitted a selective enforcement cause of action when a suspect classification appears, or when selective enforcement occurs in retaliation for the exercise of a fundamental constitutional right. Quoting from *Boles, supra*, a panel of the Court of Appeals in *U.S. v. Hazel*, 696 F.2d 473 (6th Cir. 1982), stated at 474:

> [It] has been held that a defendant asserting selective prosecution: '. . . bears the heavy burden of establishing, at least prima facie, (1) that while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of his constitutional rights.'

In *Hazel*, the Court of Appeals approved a broader cause of action than the one approved in *Boles* which required a suspect classification. *Hazel* extended equal protection guarantees to all those cases where there is intent to prevent the exercise of an underlying fundamental constitutional right, whether invoking a suspect classification or not.

The Court of Appeals' opinion in the instant case relies upon both *Boles* and *Hazel* as well as numerous other decisions of this Court. (Petitioner's appendix, pp 12-14). Moreover, the Court of Appeals in this case cited several other Circuits that did not mention improper motive as a *prima facie* case for selective enforcement. (Petitioner's appendix, pp 16-17, n 11). Therefore, when Petitioner criticizes the Court of Appeals for not citing "a single decision endorsing" its holding, he is clearly overstating the case. Likewise, when he describes the Court of Appeals' opinion as "narrowing the breadth of the Equal Protection Clause," he similarly misrepresents the limited definition of selective enforcement circumscribed by this Court in *Boles*. Instead, in reliance upon *Hazel* the Court of Appeals opinion in this case actually expands this Court's definition of selective enforcement, but finds that Petitioner does not fit within even that expanded definition of his cause of action.

Regardless of which interpretation of this cause of action is used--the more stringent *Boles* or the more liberal *Hazel* criteria--Petitioner has not alleged that he was prevented from exercising a fundamental constitutional right.

This is not a case where Petitioner was prevented from exercising the right of free speech or assembly, for example, as a result of the alleged unequal enforcement. Rather, he was prevented from continuing to violate the wastewater surface discharge permit. This is not the kind of conduct the equal protection selective enforcement cause of action was intended to protect. Petitioner does not have a fundamental constitutional right to violate the law.

Absent a suspect classification under *Boles*, or at least suppression of a fundamental constitutional right under *Hazel*, there can be no selective enforcement violation of the Equal Protection Clause even under the more liberal standard utilized by the Court of Appeals in this case. "[T]he abuse charged in this case [enforcement with impure thoughts but no suspect classification or fundamental right involved] is remote from the primary concern of the framers of the equal protection clause." *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995). Accordingly, the Court of Appeals was certainly correct in rejecting Petitioner's boundless interpretation, which would transform the selective enforcement cause of action into some kind of federal intentional tort under the Equal Protection Clause.

2. Creation At This Time Of A Constitutional Cause Of Action For Improper Motive Will Not Change The Judgment For Respondent Caterino.

Even if this Court is inclined to expand the *Boles* definition of selective enforcement beyond what the Court of Appeals did in *Hazel*, that would not change the result as to Respondent Caterino, because he has qualified immunity. The district court held that Mr. Caterino was shielded from liability, because "his action was objectively reasonable" and "did not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (Petitioner's appendix, p 29). However, Petitioner thinks the Court of Appeals "did not address the qualified immunity issue." (Petition for Certiorari, p 9, n 4). Clearly, that is not an accurate assessment because the court explicitly "addressed" the issue in its opinion. (Petitioner's appendix p 11, n 6). Indeed, it seems to Respondents that

the Court of Appeals affirmed the district court holding when it held that Mr. Caterino had violated no constitutional right. (Petitioner's Appendix, p 21). Yet Petitioner has not asked this Court to review the qualified immunity issue.

In any event, from the discussion in part one above, it is absolutely clear that no constitutional right of the nature claimed by Petitioner existed under the *Boles* decision of this Court or pre-existing decisions of the Court of Appeals. Indeed, the Court of Appeals' opinion now under appeal stated, "This Circuit has not squarely addressed the question of what aims are forbidden ones for the purposes of a selective enforcement action . . ." or whether "an allegation of malice is sufficient . . . ." (Petitioner's appendix, pp 13, 14-15). Obviously, neither the Court of Appeals nor this Court have accepted a selective enforcement cause of action for improper motive. Because neither this Court nor the Court of Appeals had clearly delineated the cause of action asserted here by the time Respondent Caterino acted, he would still have qualified immunity even if this Court were to grant certiorari and ultimately adopt Petitioner's request to expand the *Boles* definition. *See, inter alia, Seigert v. Gilley*, 500 U.S. 226, 231 (1991), which requires that the constitutional right be *"clearly established at the time the action occurred"* (Emphasis supplied) before the defense of qualified immunity can be surmounted. Here, the constitutional "right" to be free from selective enforcement motivated by bad faith or malice does not yet exist, so Mr. Caterino cannot be liable for violating such a "right."

Indeed, in *Seigert, supra*, this Court reviewed a claim that the defendant federal employee had deprived plaintiff of a "liberty" interest by allegedly writing an adverse employment recommendation "with bad faith and malice." (*Id.*, pp 230, 232). This Court held that plaintiff had "failed not only to allege the violation of a constitutional right that was clearly established at the time of [defendant's] . . . actions, *but also to establish the violation of any constitutional right at all.*" (*Id.*, p 233) (Emphasis supplied). In *Seigert*, this Court found that official action motivated by malice and bad faith did not violate the constitution *and* did not

overcome qualified immunity. The same is true here; Petitioner has not stated a cause of action for selective enforcement *and* has not alleged violation of a clearly established constitutional right. As a result, qualified immunity will dictate the same result in this case, even if this Court grants certiorari and creates new rights.

3. Separate Grounds Support The Judgment Of The Court Of Appeals For The State Department Directors.

As noted in part two above, creating new constitutional rights will not change the result as to Respondent Caterino, because he is protected by qualified immunity. Similarly, the relief Petitioner seeks will not change the judgment granted to the State department directors either, because they are protected by Eleventh Amendment immunity.

In the district court, Petitioner purported to invoke the "long-standing rule that a State Official can be sued for prospective equitable relief in his or her official capacity." (Petitioner's District Court Brief in Response to Motions to Dismiss, p 3; R 21). On the contrary, the long-standing rule holds that official-capacity actions are generally barred by the Eleventh Amendment, because they are in fact against the State. In *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 100-101 (1983), this Court held that the Eleventh Amendment is a jurisdictional bar to any kind of relief, legal or equitable, against State agencies. Petitioner finally conceded this at the district court level.

However, analysis of the Eleventh Amendment in this case cannot go forward without reference to another well-established rule that "even though a state is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974); *Quern v. Jordan*, 440 U.S. 332 (1979); *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459 (1945). *See also, Hazard v. Weinberger*, 382 F. Supp. 225 (1974) (in which it was held that the State of New York, its officials, and particularly the Bureau of Workers' Compensation were immune from a civil tort suit under the concept of sovereign immunity pursuant

to the Eleventh Amendment); *Mt. City Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977); *Alabama v. Pugh*, 438 U.S. 781 (1978); and *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937).

For example, State officials sued in their official capacities also share Eleventh Amendment immunity:

> The Eleventh Amendment bars a suit against state officials when the state is the real, substantial, party in interest. *Ford Motor, supra.*
>
> Thus, '[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.' [citation omitted] And, as when the State itself is named, a suit against state officials that is in fact a suit against the State is barred regardless of whether it seeks damages or injunctive relief.

465 U.S. at 101. Here, Ms. Davis-Anthony and Mr. Harmes were named nominally in the complaint and the decree would operate against the State. In fact, the equitable relief sought in the complaint is sought expressly against "MDPH" and "MDNR," not the directors. Therefore, the directors are also protected by the Eleventh Amendment from suits such as this for equitable relief or monetary damages.

No case makes this more clear than *Hafer v. Melo*, 502 U.S. 21, 26 (1991), cited by Petitioner to the district court. *Hafer* states:

> Although 'state officials literally are persons,' an official-capacity suit against a state officer 'is not a suit against the official but rather is a suit against the official's office. As such it is no different from a suit against the state.'

Any suit against the State, including an official capacity suit against a State official for prospective relief, is barred by the Eleventh Amendment, unless it falls within the *Ex Parte Young* exception permitting prospective injunctive relief against ongoing unconstitutional conduct of the official.

Petitioner asked the Court of Appeals to broaden this exception to permit prospective equitable relief against a State official in his or her official capacity, on grounds of *respondeat superior*, even though that official has not herself acted unconstitutionally or participated in the alleged unconstitutional conduct in any way whatsoever. The Court of Appeals accepted Petitioner's argument. However, this interpretation exceeds the *Ex Parte Young* exception to Eleventh Amendment immunity.

Ex Parte Young, 209 U.S. 123 (1908), carved out an exception permitting prospective injunctive relief against a State official enforcing an unconstitutional State statute. Thereafter, this exception was expanded somewhat to permit prospective injunctive relief against any unconstitutional conduct by a State official whether pursuant to a State statute or not. *See, e.g., Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89 (1983). However, the *Ex Parte Young* exception has never been expanded by this court to permit prospective injunctive relief against a State official who has not engaged in unconstitutional conduct in some way.

The *Ex Parte Young* exception was accomplished by the fiction that the *individual* and not the State was being sued:

> [T]he use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity . . . . [T]he officer . . . is in that case stripped of his official or representative character and is subjected in his person to the consequences of *his individual conduct*.

209 U.S. at 159-160. (Emphasis supplied). Thus, the *Ex Parte Young* exception is based on the pre-existence of unconstitutional conduct *by the individual*. If there is no unconstitutional conduct *by the individual* sued, the exception is unsupported and inapplicable.

Plaintiffs in federal court simply may not bind a State by prospective relief through an official-capacity suit. They can only bind an individual State official who is accused of unconstitutional conduct. Here, that State employee whose conduct is at issue is also being sued in his personal capacity for injunctive relief and money damages. Because an injunction is available as to him, there is no reason to issue an injunction against Ms. Davis-Anthony or Mr. Harmes, especially since there is no allegation in this case of an unconstitutional policy or custom that would require such an injunction. Therefore, the department directors are protected by the Eleventh Amendment because this is an official-capacity suit against their State offices, they are not accused as individuals of unconstitutional conduct, and they are not stripped of their official character by the *Ex Parte Young* exception.

Petitioner's claim to the contrary in the court below was based upon *Kentucky v. Graham*, 473 U.S. 159, 167 (1985); *Will v. Mich. Dept. of State Police*, 491 U.S. 58 (1989); *Hoptowit v. Spellman*, 753 F.2d 779 (9th Cir. 1985); *Adams v. Pate*, 445 F.2d 105 (7th Cir. 1971); and *Harrington v. Grayson*, 764 F. Supp. 464 (1991). However, the *Will*, *Graham*, *Hoptowit*, *Adams* and *Harrington* cases are all consistent with Respondents' argument here. When an unconstitutional policy or custom is in place, the official himself or herself is a participant in the unconstitutional conduct, is stripped of official status under *Ex Parte Young*, and may be enjoined as an individual, but unconstitutional policy or custom is not alleged in this case.

This case is nearer the facts in *Rizzo v. Goode*, 423 U.S. 362 (1976), which rejected equitable relief under 42 U.S.C. §1983, *inter alia*, because of the absence of personal involvement by supervisory personnel in unconstitutional conduct of various police officers. The plaintiffs in *Rizzo* sought an injunction against supervisory officials who had not engaged in unconstitutional conduct. Distinguishing those cases in which the officials had participated individually, this Court reversed the court of appeals and district court who had permitted the injunction against State officials without a showing of direct responsibility. *See also*, *Poe v. Haydon*, 853 F.2d 418, 429 (6th Cir. 1988)

(supervisory official's failure to supervise, control or train the offending individual is not actionable, unless the supervisor "either encouraged the specific incident of misconduct or in some other way directly participated in it.").

The same result is appropriate here, because Ms. Davis-Anthony and Mr. Harmes are not alleged to have participated in any way whatsoever in any allegedly unconstitutional conduct. Petitioner has made no allegation that the State agencies have an institutional policy or custom permitting or accepting selective enforcement or any other constitutional violation, so it cannot be said that Ms. Davis-Anthony or Mr. Harmes is even indirectly responsible.

4. There Is No Irreconcilable Or Intolerable Conflict Between Court Of Appeals Opinions.

Petitioner has tried to persuade this Court to review this case because of an alleged conflict between the opinion under review and opinions in other Circuits, as well as another opinion of the Court of Appeals for the Sixth Circuit. However, the opinions relied upon by Petitioner present mere inconsistency in dicta or in general principles, but do not create a "real," "true," "direct," or "irreconcilable" conflict (R. Stern, et. al. *Supreme Court Practice*, 7th ed., 167-168 (1993))--and certainly not an "intolerable" conflict (S. Baker, *A Practical Guide to Certiorari*, 33 Cath. U. L. Rev. 611, 617 (1984))--demanding this Court's review. In fact, there are so few selective enforcement cases addressing the improper motive issue that this Court has reasonable justification for awaiting further development of the issue by the lower courts. *See e.g.*, Justice Stevens, *Some Thoughts on Judicial Restraint*, 66 Judicature 230, 233 (1983); *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J) and *Gilliard v. Mississippi*, 464 U.S. 867 (1983) (Marshall, J).

a. There Is No Conflict Between Opinions Of The Court Of Appeals For The Sixth Circuit.

Petitioner claims a conflict between the opinion in this case and the language in *Wright v. Metro Health Medical Center*, 58 F.3d 1130, 1137, n 7 (6th Cir. 1995). This contention was disposed of by the Court of Appeals' opinion here: "In *Wright*, however, the issue of selective enforcement was not addressed because the plaintiff did not raise it below, and because the plaintiff made *no* allegation as to the defendant's intent." Therefore, the *Wright* opinion cannot legitimately be said to conflict with the opinion in this case.

b. There Is No True Or Direct Conflict Between This Opinion And Those Of Other Circuits.

Petitioner relies upon five Court of Appeals opinions to support his claim of conflict. The first is *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), and another is *Smith v. Eastern New Mexico Medical Center*, 72 F.3d 138; 1995 WL 749712 (10th Cir. December 19, 1995), which relies upon *Esmail*. However, *Esmail* does not conflict with this case because the facts are so dissimilar.

Here, Respondent Caterino's enforcement action of issuing a notice of non-compliance was entirely consistent with and based upon the valid provisions of a surface wastewater discharge permit that Petitioner indisputably had not complied with. Moreover, Mr. Caterino's decision was only the first step in an administrative process--the result of which is appealable to court--that includes evidentiary hearings, where Mr. Caterino's actions would be reviewed and his decision could easily be changed by either the MDNR or the MMHC. In contrast, *Esmail* involved "an orchestrated campaign of official harassment directed against . . . [the plaintiff] out of sheer malice." 53 F.3d at 179. "[T]he unequal treatment is alleged to have been the result solely of a vindictive campaign by the mayor" who "harbors a malignant animosity toward him." (*Id.*) The *Esmail* opinion states the Equal Protection Clause can be "a

kind of last-ditch protection against governmental action *wholly impossible to relate to legitimate government objectives."* (*Id.* at 180) (Emphasis supplied). The facts in that case are so different from the facts in the instant case--where Mr. Caterino's actions served only to begin an administrative review process--that a real conflict does not exist between *Esmail* or *Smith.*

Moreover, *Smith* is an unpublished opinion that--in addition to being heavily reliant on *Esmail*--is also characterized by allegations indicating that defendant exercised unfettered discretion to "oppress" the plaintiff. (Slip opinion, pp 8-9). Likewise, *Burt v. City of New York*, 156 F.2d 791 (2d Cir. 1946), also relied upon by Petitioner, is dependent upon allegations of "unlawful oppression" (156 F.2d at 793) that have never been made here. Instead, aside from the claims of improper motive made for the first time on appeal, Mr. Caterino is not charged with unlawful or oppressive conduct.

Another of Petitioner's cases, *Batra v. Bd. of Regents of Univ. of Nebraska*, 79 F.3d 717 (8th Cir. 1996), does not present a real conflict because the plaintiffs in that case claimed to be part of a protected class (*Id.* at 719), which Petitioner in this case does not. Additionally, *Batra* required *"unlawful* intent to discriminate against plaintiff *for an invalid reason."* (*Id.* at 721) (Emphasis supplied). As noted above, if not for the claim of improper motive made on appeal, Mr. Caterino's actions were otherwise lawful, and were taken for valid reasons, clearly related to legitimate government objectives.

Petitioner's remaining cases from the First and Second Circuits were dealt with in the Court of Appeals' opinion under appeal. The Court of Appeals found it "unwise to adopt the often-stated, but never-used rule of the First and Second Circuits." (Petitioner's appendix, p 16). Examining a number of cases from the Courts of Appeals for the First and Second Circuits, the Court of Appeals in this case found that, while these other Circuit Courts said they will allow relief for malice in selective enforcement, neither "has ever affirmed a victory for plaintiff on such a theory." (*Id.* at 15).

Thus, the incongruity among these opinions that Petitioner cites appears, upon closer examination, to be more imaginary than real, and more of an inconsistency in dicta or disagreement over general principles than true, direct, irreconcilable conflict. Accordingly, the state of the case law in the various Circuits relied upon by Petitioner does not demand this Court's review.

5. The Issue Of Improper Motive Was Not Raised In The District Court.

The Court of Appeals' opinion correctly notes the lack of any allegation of impermissible intent in the complaint upon which the district court ruled. (Petitioner's appendix, pp 14-15, n 9). But the Court of Appeals incorrectly suggests "malice" and "bad faith" appeared in the district court briefs and arguments. (*Id.*) On the contrary, the term "bad faith" used to describe Mr. Caterino's motive did not appear in Petitioner's argument until his appellate lawyers apparently deemed it necessary for their success under the bad faith criterion of *Hazel, supra*, and that term was then placed in Petitioner's Brief on Appeal to the Court of Appeals for the first time. The word "malice" did not appear to describe Mr. Caterino's motive until it was used for the first time for that purpose in the Petition for Rehearing and Suggestion for Rehearing En Banc in the Court of Appeals, presumably to take advantage of the authority now being cited. Indeed, on page 7 of his district court Brief in Response to Motion to Dismiss (R 21), Petitioner wrote, "the facts upon which Futernick relies do not even involve subjective intent or motivation . . . ."

In the complaint (R 1), the only allegations against Mr. Caterino were that the failure of MDNR, Mr. Caterino and the MDPH to enforce against other mobile home parks was a result of purposeful and intentional discrimination against Petitioner, which allegedly constituted unequal and discriminatory administration of the law (¶ 48). This was the allegation being made at the time the State Respondents' motions were filed.

In his district court brief for injunctive relief (R 17), Petitioner for the first time made allegations, not specifically

naming Mr. Caterino, that "state officials got together with Sumpter Township to coerce . . . [Petitioner] into making financial contributions toward construction of the Sumpter Township sewer system." (Petitioner's District Court Preliminary Injunction Brief, pp 16-17; R 17). The severity of the allegations made were thus raised a level in a brief without the citation of any supporting evidence or amendment of the complaint. Moreover, the level of severity was raised another notch during oral argument at the hearing conducted by the district court on April 28, 1993 (R 33), where Petitioner labeled the alleged conduct as a conspiracy to deprive him of money. (Transcript of April 28, 1993 District Court hearing, pp 21-22). In his third brief to the district court (R 36) on these issues, Petitioner raised the level of rhetoric even higher (still with no evidence that supported such conclusions or any amendment to the Complaint) by charging Mr. Caterino alone with (1) "conspiracy and collusion with Sumpter Township and its officials to extract money from Futernick under the guise of--and utilizing the threat of--regulatory action," and (2) "vastly disparate regulatory treatment over the years." (Petitioner's Court of Appeals Supplemental Brief, p 1; R 36). Still, there was no use of the terms "malice" or "bad faith" by Petitioner.

In the Court of Appeals Petitioner's factual allegations metamorphosed into a claim that State officials (not specifically naming Mr. Caterino) violated Petitioner's constitutional rights "when they subjected him to stringent permit requirements while leaving other mobile home parks in the area unmolested, because this disparate treatment was motivated by a bad faith purpose either arising out of personal animus or intent to collude with the township in an attempt to exclude him from the sewer system." (Petitioner's Court of Appeals Brief on Appeal, pp 16-17). As to Mr. Caterino, Petitioner then stated "the evidence is overwhelming that Caterino's selective enforcement was motivated by *bad faith* based on either personal animus or his intent to collude with the township in its efforts to exclude Mr. Futernick's parks from the sewer system." (*Id.*, p 47.) (Emphasis supplied). So "bad faith" surfaces for the first time in Petitioner's appellate brief, but there is still no use of the term malice.

Allegations of "malice" did not appear until the Petition for Rehearing in the Court of Appeals and the Petition for Certiorari filed with this Court. Now the allegations have risen and transmogrified from the relatively benign recitation contained in the complaint to the emotion-filled claims of animus or bad faith appearing for the first time in Petitioner's Court of Appeals brief and the exaggerated claims of malice deemed necessary by Petitioner's appellate lawyers to make his claims fit the new case law they cite here. This change in the charges and Petitioner's tone has all occurred without any amendment to the complaint or any real change in the underlying factual allegations.

Mr. Caterino is still accused, as he was in the complaint, of not having accepted Irwin Futernick's version of the arrangement with the township for sewers, and to have insisted on hearing these assurances himself. His insistence was actually provident, because it turned out that Petitioner's son, Irwin, had no agreement of substance with either MDNR or Sumpter Township. Mr. Caterino's persistence and subsequent issuance of a Certificate of Non-compliance, after the vaporous nature of Irwin's assurance was revealed, is conduct to be commended in a public official, not conduct to be disparaged.

This is the conduct that Mr. Caterino has been charged with from the beginning. Petitioner's appellate lawyers now attribute different motives to Mr. Caterino's actions, but the basic conduct remains unchanged. This is not unconstitutional conduct; enforcement of valid permit provisions several months after violations began does not trample on any known constitutional right, regardless of motive.

6. The Issue Of Improper Motive Does Not Constitute A Question Of Wide Constitutional Importance.

The Court of Appeals opinion observes that improper motive for enforcing state law is not the kind of issue that the constitution was designed to prevent. "[We] see compelling reasons that the sundry motivations of local regulators should *not* be policed by the Equal Protection

Clause of the United States Constitution, absent the intent to harm a protected group or punish the exercise of a fundamental right." (Petitioner's appendix, p 17). One of the reasons for not accepting Petitioner's invitation to further expand the selective enforcement cause of action was that "we federalize and constitutionalize what are essentially issues of local law and policy." (*Id.*, pp 18-19). Thus, the Court of Appeals recognized that the remedy for Petitioner's claim, if any is needed, must be found under State law.

a. State Tort Laws And Hearing Procedures Provide Adequate Remedies, If Any Are Needed, For State Action Allegedly Based Upon Improper Motive.

The Court of Appeals observed that "[r]egulation out of personal dislike or vendetta is repugnant to the American tradition of the rule of law," but accepted the proposition that "the states themselves are vibrant defenders of this tradition." (*Id.*, p 19). The States may be trusted to police adequately their own processes. As a low level State employee, Respondent Caterino is not in a position to "overawe" (Petition for Certiorari, p 18) State court judges. He is not a powerful State official, but only a district engineer trying to do his job as he sees it. Indeed, the Court of Appeals noted that Petitioner has recourse through State political processes, State courts on State constitutional grounds, or State courts on federal due process grounds ultimately reviewable by this Court. To this list of possible State remedies can be added State tort law and hearing procedures. If States, through their courts, see abuse of official authority as a problem needing a solution, State tort remedies can be adopted by common law or statutory provisions. Moreover, as noted in part 4b above, either MDNR or MMHC can refuse to proceed against Petitioner if they view Mr. Caterino's actions as inappropriate. There is no need to expand the existing federal selective enforcement remedy to address the "sundry motivations" of State regulators.

b. The Improper Motive Alleged In This Case Is Non-Recurring And Of A Unique Factual Nature With No Significant Public Impact.

As noted in part three above, there are no allegations in this case of a State policy or custom that suggests a broad design or widespread failure to police selective enforcement within the State departments. Rather, the allegation is that Respondent Caterino personally dislikes Petitioner. As noted in the above Statement of Facts, Mr. Caterino does not even know Petitioner, so he cannot by definition have any animosity toward him. Be that as it may, the point is that the issue of Mr. Caterino's animosity for Petitioner, or that of any given State regulator, is not a matter of grave public importance, does not have significant public impact, and does not implicate national constitutional concerns. "The Constitution's protection begins only when the *incidence* of the burden of regulation becomes constitutionally suspicious." (Petitioner's appendix, p 19). Here, no such concerns attend the allegations, and this case is not worthy of review at this level.

CONCLUSION

For the above reasons, the Petition for Certiorari should be denied, and the Court of Appeals' refusal to expand further this Court's narrowly circumscribed definition of the selective enforcement cause of action should stand unchanged.

Respectfully submitted,

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CASES/Futernick

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In The

Supreme Court of the United States

October Term, 1995

SHELDON FUTERNICK, d/b/a HOLIDAY WEST MOBILE HOME PARK and d/b/a HOLIDAY WOODS MOBILE HOME PARK,

Petitioner,

v.

JON CATERINO; ROLAND HARMES, Director, Michigan Department of Natural Resources; VERNICE DAVIS ANTHONY, Director, Michigan Department of Public Health,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITIONER SHELDON FUTERNICK'S PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITIONER SHELDON FUTERNICK'S PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Pursuant to Supreme Court Rule 15.6, Petitioner Sheldon Futernick submits this reply brief in support of the petition for writ of certiorari that he filed on July 18, 1996. In the interest of brevity, only new matters and the most salient misstatements contained in Respondents' Brief dated September 16, 1996 ("Respondents' Brief") are replied to in this brief.

ARGUMENT

1. In Its Prior Decisions, This Court Has Not Squarely Addressed Whether Selective Enforcement of the Law Motivated by Malice or Bad Faith Violates the Equal Protection Clause, But *Oyler v Boles* Implicitly Rejects the Decision Below.

In his petition, Mr. Futernick asks this Court to resolve a conflict between the circuits as to whether the Equal Protection Clause is violated when a state official selectively enforces the law motivated by malice or bad faith. Respondents contend that this Court has already addressed this issue in *Oyler v Boles*, 368 U.S. 448 (1962). *See* Respondents' Brief at 5. In *Oyler*, criminal defendants who had been sentenced under a habitual offender statute claimed that they had been denied the equal protection of the laws simply because criminal defendants in other cases with greater numbers of felonies were not sentenced under the statute. This Court noted that the

defendants in *Oyler* had not alleged that the application of the habitual offender statute against them was the result of a decision to proceed "only in a certain class of cases or against *specific persons*." *Id.* at 456 (emphasis added). Finding that there was no allegation that the selection was based "upon an unjustifiable standard such as race, religion, or other arbitrary classification," the Court held that there had been no violation of the Equal Protection Clause. *Id. Oyler* did not squarely address the issue of whether selective enforcement motivated by malice or bad faith violates the Equal Protection Clause. However, the general test enunciated in *Oyler* as violative of the Equal Protection Clause – "selection . . . deliberately based upon an unjustifiable standard" – would certainly be satisfied by allegations of bad faith or malice.

Thus, far from supporting Respondents' position, *Oyler* implicitly rejects it. By correcting the Sixth Circuit's deviation from the broad principle recognized in *Oyler*, this Court's grant of review in the present case would not only resolve a conflict between six Courts of Appeals, but would serve the additional interest of reversing a decision that addressed "an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c).

2. The Court of Appeals Did Not Base Its Affirmance of the Dismissal of Claims Against Respondent Caterino on the Grounds of Qualified Immunity.

Respondent Caterino contends that, even if this Court were to reverse the Court of Appeals on the issue

of whether allegations of bad faith or malice state a claim for the unequal protection of the law, he would still be entitled to a dismissal of claims under his defense of qualified immunity. Respondents' Brief at 7. Respondent Caterino's theory is that the Court of Appeals addressed his contention that he had not violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.*[1]

Respondent Caterino plainly errs, because the Court of Appeals did not affirm the dismissal of claims against him on the grounds of qualified immunity. The Court of Appeals observed in a footnote that the defense of qualified immunity requires a showing of (i) a violation of a constitutional right (ii) of which a reasonable official in his situation would have been aware. 78 F.3d at 1056, n.6. The Court then reasoned that, since a holding that Mr. Futernick had failed to state a claim would necessarily include a holding that Caterino had not violated a constitutional right of which a reasonable official would have been aware, "it seems prudent to address the 12(b)(6) dismissal first." *Id.*

That brief footnote – without any discussion of case law or other authorities – is the *only* mention of qualified immunity in the entire opinion. The footnote makes clear

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[1] Respondent Caterino's theory applies only to him and not to the other Respondents, who, as directors of governmental agencies, are being sued solely for prospective injunctive relief – not for money damages – and as to whom the defense of qualified immunity does not apply. *E.g., Williams v Kentucky*, 24 F.3d 1526, 1541 (6th Cir. 1994) ("qualified immunity only immunizes defendants from monetary damages").

that the Court of Appeals was *only* addressing the F.R.Civ.P. 12(b)(6) issue – whether Mr. Futernick had stated a claim for a violation of the Equal Protection Clause – not qualified immunity, which Caterino had characterized as a F.R.Civ.P. 12(b)(1) issue. (R. 5: Motion to Dismiss Public Health Defendants at 2). Elsewhere in the opinion, the Court of Appeals reiterated that the sole basis for affirming dismissal was that "Futernick fails to state a claim upon which relief can be granted." 78 F.3d at 1055. Notably, there is no statement in the opinion that the dismissal was based on the alternative grounds of qualified immunity.

Since the Court of Appeals did not rest its decision, either in whole or even in part, on the grounds of qualified immunity, it would have been inappropriate for Mr. Futernick to seek review of that issue in this Court. This Court ordinarily declines to review issues not discussed in the Court of Appeals' decision. *E.g., Carden v Arkoma Assoc.*, 494 U.S. 185, 197 (1990). If review is granted on the equal protection issue and the Court of Appeals is reversed on that issue, the appropriate procedure would be for this Court to remand to the Court of Appeals, which can then address the qualified immunity issue.

Respondent Caterino attempts to argue that he will prevail on qualified immunity grounds, because the constitutional right asserted by Mr. Futernick was not recognized at the time of Caterino's actions in late 1992. Respondents' Brief at 8. While this argument should await remand to the Court of Appeals, the short answer is that the constitutional right asserted by Mr. Futernick *was* recognized prior to Caterino's action. *See Burt v City of New York*, 156 F.2d 791 (2d Cir. 1946); *Yerardi's Moody St.*

Restaurant v Board of Selectmen, 932 F.2d 89 (1st Cir. 1991); *FSK Drug Corp. v Perales*, 960 F.2d 6 (2d Cir. 1992); *cf. Oyler v Boles*, 368 U.S. 448 (1962). The only decision calling into question such a right is the Court of Appeals' decision in this case.[2]

3. There Is No Independent Basis for Affirming the Dismissal as to the Other Respondents.

Respondents Harmes and Anthony, who were sued in their respective capacities as Directors of the Michigan Department of Natural Resources and the Michigan Department of Public Health, contend that the Eleventh Amendment provides an alternative basis for affirming the dismissal of claims for prospective injunctive relief as to them. Respondents' Brief at 9.

However, the Court of Appeals expressly rejected this contention, holding that "the state agency defendants are not entitled to Eleventh Amendment immunity. . . . " 78 F.3d at 1055. In fact, the Court of Appeals stated that

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[2] Misleadingly, Caterino argues that this Court, in *Siegert v Gilley*, 500 U.S. 226 (1991), held that "official action motivated by malice and bad faith did not violate the constitution. . . . " Respondents' Brief at 8. In fact, *Siegert* held that the writing of a disparaging letter with malice by a governmental hospital supervisor to plaintiff's prospective employer did not violate the Due Process Clause. 500 U.S. at 234. The analysis focussed entirely on whether plaintiff had a "liberty" interest cognizable under the Due Process Clause. *Id.* at 233-234. The case did not purport to discuss the Equal Protection Clause at all, much less the more limited universe of selective enforcement.

Respondents' argument in support of their claim to Eleventh Amendment immunity was "ridiculous." *Id.* at 1055, n.5.

Had Respondents desired to bring this issue before the Court, the appropriate procedure to follow would have been to file a cross-petition or conditional cross-petition for certiorari. Supreme Court Rule 12.5. Respondents' failure to do so only confirms that the Court of Appeals' decision on the Eleventh Amendment issue does not merit review.

4. The Issue of Improper Motive Was Properly Raised in This Case.

Respondents argue that Petitioner did not raise the issue of improper motive in the district court. Respondents' Brief at 16.

Simply put, this is untrue. Certainly, the Court of Appeals believed that the issue had been raised in the district court, because it decided the improper motive issue, notwithstanding Respondents' contention in the Court of Appeals that the issue had not been raised in the district court. *See* Brief on Appeal of Jon Caterino and Michigan Department of Public Health, Vernice Davis Anthony, Director, dated March 15, 1995 at 22-23.

The complaint alleged that Respondents had engaged in "arbitrary and discriminatory action against Futernick," and requested a declaration that Respondents had "selectively enforced applicable laws and regulations and have purposefully discriminated against Futernick in violation of his right to equal protection of the law. . . . " (R. 1: Verified Complaint at 12, 21). Under principles of

notice pleading – where the failure to mention talismanic labels is not fatal – the allegations made in that district court pleading were plainly sufficient. *See, e.g., Conley v Gibson*, 355 U.S. 41, 48 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.").

Moreover, the voluminous briefs filed in the district court – one of which Respondents noted (Respondents' Brief at 2) was accompanied by a binder containing "some 500 pages" of documentary evidence – unquestionably were directed to demonstrating improper motive. *See, e.g.*, Plaintiff's Supplemental Brief in Response to Motions to Dismiss at 13-25 (R. 36), which set forth "the demonstrated evidence that Caterino has subjected Futernick to disparate treatment from that accorded other area mobile home parks and has discriminated against him in a manner violative of the Equal Protection Clause. . . . "

In any event, even if Respondents' contention were true, the Court of Appeals' decision in this case has created an intolerable conflict between the circuits. The Sixth Circuit, having rejected Respondents' contention that the improper motive issue had not been raised in the district court, has now issued an opinion that is at variance with the law in five other circuits. Even if the Sixth Circuit was wrong about whether the issue of improper motive had been raised in the district court, this Court should grant review so as to address this fundamental issue and resolve the conflict.

CONCLUSION

For the above reasons and the reasons stated in his Petition, Mr. Futernick respectfully requests that the Court grant the writ.

Respectfully submitted,

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